S. HRG. 98-477

OFFICE MACHINE AND EQUIPMENT DEALERS' ACT

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 286

TO PROMOTE INTERSTATE COMMERCE BY REGULATING THE CONTRACTUAL ARRANGEMENTS BETWEEN SUPPLIERS AND RETAILERS IN THE OFFICE MACHINE AND EQUIPMENT INDUSTRY, AND FOR OTHER PURPOSES

SEPTEMBER 14, 1983

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CONTENTS

	Page
Opening statement by Senator Kasten	1
Opening statement by Senator Exon	12
Text of S. 286	2

LIST OF WITNESSES

Douglas, Hon. George, Commissioner, Federal Trade Commission	14
Prepared statement	15
Eizenstat, Stuart, counsel, accompanied by A. G. W. Biddle, president, Computer and Communications Industry Association; Allen R. Ferguson, chairman, National Institute of Economics and Law; Neil Kuenn, counsel, National Association of Wholesale-Distributors; Thomas A. Finn, office equipment dealer; Terry Lautenbach, vice president, IBM Corp.; D. W. McArthur, vice president, 3M Co.; Tom Pratt, vice president, Herman Miller, Inc.; and Robert Nichols, counsel, Consumers Union	83
Prepared statement of Mr. Eizenstat	85
Answers to questions of the committee	127
Prepared statement of Mr. Nichols	98
Prepared statement of Mr. Lautenbach	101
Answers to questions of Senator Riegle	144
Prepared statement of Mr. McArthur	106
Prepared statement of Mr. Pratt	114
Answers to questions of Senator Riegle	145
Kuchta, John J., president, Lincoln Office Equipment Co.; Robert C. Goldberg, counsel; Richard Nelson, president, Ohio Business Machines, Inc.; James H. Ayres, president, Gilson-Ayres, Inc.; and Henry E. Doss, president, Doss-Price Office Systems, Inc	24
Prepared statement of:	
Mr. Kuchta	26
Mr. Ayres	31
Mr. Doss	35
Mr. Nelson	39
Mr. Goldberg	53
Answers to questions of Senator Kasten	69
Answers to questions of Senator Pressler	79
Answers to questions of Senator Gorton	80

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

Anderson, James A., director, congressional affairs, National Association of Wholesaler-Distributors, letter with statements of September 12, 1983	176
Ask the Attorney, article	123
Baxter, William F., Assistant Attorney General, Antitrust Division, Department of Justice, statement	18
Biddle, A. G. W., president, Computer and Communications Industry Association, statement	151
Buc, Nancy L., Weil, Gotshal and Manges, letter of October 13, 1983	61
Computer and Business Equipment Manufacturers Association, statement	170
DeGlopper, Jon, president, Dealer's Office Equipment, letter of March 16, 1983	174
Digital Equipment Corp., statement	173
Ferguson, Allen R., chairman, National Institute of Economics and Law, statement	156

Page

Goldberg, Robert C., National Office Machine Dealers Association, letter of September 28, 1983 124
Hagerty, Kenneth C. O., vice president, government operations, American Electronics Association, letter of October 19, 1983 180
Kurita (Joe), Koichiro, general manager, Copier Products Division, Panasonic Industrial Co., letter of April 13, 1983 61
Leahy, Hon. Patrick, and Hon. Robert T. Stafford, U.S. Senators; and Hon. Jim Jeffords, U.S. Representative, letter of September 2, 1983 176
Lotter, John, president, Business Records Manufacturers Association, statement 168
Rosenow, James F., corporate attorney, Brandt, Inc., letter of August 16, 1983. 175
Scott, Dan P., president, National Office Products Association:
Letter of September 19, 1983 63
Prepared statement 162
Seltzer, Bernard, executive vice president, Wholesale Stationers Association, statement 166
Shapiro, Gary J., counsel, Consumer Electronics Group, Electronic Industries Association, statement 164
Skyrms, James C., vice president and general manager, Micro Switch, letter of July 22, 1983 175
Swain, Frank S., Chief Counsel for Advocacy, Small Business Administration, letter of January 3, 1983 22

OFFICE MACHINE AND EQUIPMENT DEALERS' ACT

WEDNESDAY, SEPTEMBER 14, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 253, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Larry Fullerton, staff counsel; and Loretta Dunn, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Welcome to this Consumer Subcommittee hearing on S. 286, the Office Machine and Equipment Dealers' Act.

This legislation, sponsored by Senator Exon, relates to agreements between retail dealers of office products—such as photocopiers, typewriters, and computers—and suppliers of such products. Under the bill, any supplier of office products must act in good faith in all phases of negotiating, performing, terminating, and renewing a dealer agreement. Violations of this standard and other specific requirements of the bill are actionable in Federal court.

The bill has engendered great controversy. On the one hand, dealers argue that they must be protected from overbearing product suppliers, especially large multinational corporations. I can well imagine that examples do exist of unfair treatment of dealers.

To me, however, the issue is whether existing law is adequate to address these instances of abuse. State contract law, including the Uniform Commercial Code, generally governs commercial relationships, and generally imposes a requirement of good faith dealing. Other State common law, State antitrust law, and Federal antitrust laws provide additional protection.

I want to help to insure that the marketplace is free from abuse, but I will be listening closely to the testimony to try to understand how existing law has failed, and how S. 286 would remedy the problem.

[The bill follows:]

II

98TH CONGRESS
1ST SESSION

S. 286

To promote interstate commerce by regulating the contractual arrangements between suppliers and retailers in the office machine and equipment industry, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 31 (legislative day, JANUARY 25), 1983

Mr. EXON (for himself, Mr. FORD, Mr. HEFLIN, and Mr. PRESSLER) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To promote interstate commerce by regulating the contractual arrangements between suppliers and retailers in the office machine and equipment industry, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Office Machine and Equipment Dealers' Act."

DEFINITIONS

SEC. 2. For purposes of this Act, the term—

(1) "commerce" means commerce—

(A) within the United States;

(B) between the United States and a foreign nation;

(C) in any territory of the United States, among the territories, or between any territory and any State or foreign nation; or

(D) in the District of Columbia, or between the District of Columbia or any State, territory, or foreign nation;

(2) "dealer" means any person, corporation, partnership, or other form of business enterprise resident in the United States or in any territory of the United States, operating under the terms of a dealer agreement and primarily engaged in the business of selling any office product of a supplier to an end user of such office product, except that such term does not include a franchisee;

(3) "dealer agreement" means any written or oral agreement or contract between any supplier engaged in commerce and any dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract for a definite or indefinite period;

(4) "distributor" means any person, corporation, partnership, or other form of business enterprise engaged in the sale, consignment, exchange, or any other form of transfer of an office product which it manufac-

tures, assembles, constructs, creates, or obtains in any manner from a manufacturer;

(5) "franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which—

(A) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed or suggested in substantial part by a franchisor;

(B) the operation of the business of the franchisee under such plan or system is substantially associated with the trademark, service mark, trade name, logotype, advertising, or other commercial symbol of the franchisor designating the franchisor or its affiliates; and

(C) the person granted the right to engage in such business is required to pay, directly or indirectly, a franchise fee of $100 or more;

(6) "franchisee" means a person to whom a franchise is granted, or has been granted, or who participates in a franchise relationship as a franchisee;

(7) "franchisor" means a person who grants a franchise or who participates in a franchise relationship as a franchisor;

(8) "good faith" means the duty of each party to any dealer agreement, and all officers, employees, agents, or other representatives of any such party, to act in a fair, equitable manner toward each other so as to provide each party freedom from coercion, intimidation, threats of coercion or intimidation, fraud, or unconscionable conduct by the other party, except that reasonable recommendation, endorsement, exposition, persuasion, urging, or argument shall not be deemed to constitute lack of good faith;

(9) "manufacturer" means any person, corporation, partnership, or other form of business enterprise engaged in the sale, consignment, exchange, or any other form of transfer of an office product which it manufactures, assembles, constructs, or creates;

(10) "office product" and "product" mean any physical object or office machine software which is designed primarily for use in an office environment and which has a retail price greater than $100 per item, except that such term does not include—

(A) carpets, chairs, couches, dental equipment, desks, dividers, draperies, lighting or lighting fixtures, medical equipment, office accessories, plants, sofas, stands, storage systems, tables, telecommunications equipment, or textile products; or

(B) furniture designed specifically for integrated use with office machines;

(11) "supplier" means a manufacturer, distributor, or wholesaler engaged in commerce who enters into a dealer agreement with a dealer in order to supply the dealer with an office product, except that such term does not include a franchisor;

(12) "United States" means the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands; and

(13) "wholesaler" means any person, corporation, partnership, or other form of business enterprise engaged in the sales, consignment, exchange, or any other form of transfer primarily to a dealer of an office product which it obtains from a manufacturer or distributor.

TITLE I—CONTRACTS BETWEEN DEALERS AND SUPPLIERS

DUTIES OF SUPPLIER

SEC. 101. Any supplier who enters into a dealer agreement with a dealer shall—

(1) act in good faith in presenting, describing, or negotiating the terms or provisions of the dealer agreement to the dealer;

(2) act in good faith in performing or complying with any term or provision of the dealer agreement;

(3) furnish the dealer with any office product, or with any part, reference manual, or schematic related to an office product, on a timely basis;

(4) act in good faith in terminating, canceling, or refusing to renew the dealer agreement and, when applicable, comply with the procedures set out in title II of this Act;

(5) if the dealer agreement stipulates, provide sixty days notice to the dealer when establishing a new dealership in the market area of the dealer; however, such notice is not required where the dealer agreement does not specifically define the market area;

(6) allow the dealer or prospective dealer the right to be accompanied by counsel or a personal representative to any meeting between the parties for the purpose of discussing any matter regarding the dealership or proposed dealer agreement; and

(7) allow the dealer the right of free association with other dealers for any lawful purpose.

TITLE II—PROCEDURES FOR TERMINATION

TERMINATION

SEC. 201. (a) A supplier may terminate a dealer agreement which contains a specified expiration date before such date, or terminate at any time a dealer agreement which does not contain a specified expiration date, by offering the dealer involved fair and reasonable compensation for the value to the dealership of the dealer agreement, including a reasonable amount for goodwill. Such offer shall be made in writing not less than sixty days before the intended date of termination. This subsection shall not apply to the termination of a dealer agreement for just, good, or significant cause.

(b) A dealer agreement which does not contain a specified expiration date or is terminated prior to such date may contain a provision requiring the parties to submit to binding arbitration with regard to the amount of fair and reasonable compensation for the value to the dealership of the dealer agreement, including a reasonable amount for goodwill. In the absence of such a provision, the parties to an existing dealer agreement may agree in writing to settle their dispute regarding such compensation by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.

(c) Arbitration of such disputes, awards by arbitrators and confirmation of awards shall be governed by title 9, United States Code, to the extent that such title is not inconsistent with this section.

(d) An award by an arbitrator under this section shall be final and binding between the parties to the arbitration, but shall have no force or effect on any other person.

(e) Notice of the filing of any request for arbitration under this section shall be served upon the supplier involved, and such supplier shall not terminate or enforce the termination of a dealer agreement pending the outcome of such proceeding. The arbitrator shall award reasonable attorney fees and the cost of the proceeding to the prevailing party in any arbitration under this section.

TITLE III—MISCELLANEOUS PROVISIONS

PROCEDURAL REQUIREMENTS

SEC. 301. (a) Any party affected by a violation of the provisions of this Act may bring an action for damages, injunctive relief, or other equitable relief in any district court of the United States in the district in which the supplier resides, is found, has an agent, or does business.

(b) Except as otherwise provided in this Act, an action arising out of any provision of this Act shall be commenced not later than two years after the date a dealer discovered, or in the exercise of reasonable care should have discovered,

that a violation had occurred. If a supplier conceals the cause of action from the knowledge of the person or entity entitled to bring such action, the period before the discovery of the cause of action by such person or entity shall be excluded in determining the time limit for the commencement of the action.

(c) The prevailing party in any action under this section shall be awarded reasonable attorneys' fees and costs.

WAIVER PROHIBITED

SEC. 302. Any condition, stipulation, or provision purporting to bind any dealer or person acquiring any dealership to waiver of compliance with any provision of this Act is void.

ANTITRUST LAWS

SEC. 303. Nothing in this Act shall be construed to repeal, modify, or supersede, directly or indirectly, any provision of the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), or any State antitrust law.

EFFECT ON STATE LAW

SEC. 304. Nothing in this Act shall supersede the right of any State to enact or enforce any law which provides additional or stronger standards, criteria, or remedies than those provided in this Act.

EFFECTIVE DATE

SEC. 305. The provisions of this Act shall take effect on the date of enactment of this Act, and shall apply to dealer agreements entered into on or after such date.

Senator KASTEN. We have a lot of witnesses here today. I would appreciate your cooperation with the 5-minute time limit for oral presentations. Your written statements will be made a part of the record, and incidentally, the record will remain open for 10 days or 2 weeks for additional comments which may be provided to the committee.

We will try to keep disciplined with lights. The red light will go on after 5 minutes are up, and the yellow light is a warning light about a minute beforehand.

Our first witness is Hon. George Douglas, one of the Commissioners at the Federal Trade Commission, and then we have two panels, one composed of dealers and one composed of suppliers and consumer groups.

Before we begin, however, Senator Exon, do you have an opening statement?

OPENING STATEMENT BY SENATOR EXON

Senator EXON. Yes, I do, Mr. Chairman.

Mr. Chairman, near the beginning of the 97th Congress, I informed the Senate of a problem which threatened a most important sector of our economy, the small business community. In cities and towns across the United States, independent dealers in the office machine and equipment industry have become the principal channels for business and the consumers to gain access to increasingly sophisticated office products.

Today there are some 30,000 small dealers in this country whose primary income is derived from marketing and servicing typewriters, photocopiers, electronic cash registers, calculators, word processing equipment, and, of course, the new industry of computers.

Over the last decade, the Japanese and European manufacturers have captured a high share of the small office equipment market. For example, in 1979, the imports of business machines and parts totalled more than $1 billion. Foreign firms, as they began their penetration of the U.S. market at the time, relied upon the independent office machine dealers at the low cost already existing marketing arm in the United States to establish servicing capabilities.

The strong position of these home firms was established by product innovation, competitive pricing and aggressive marketing in and on behalf of the U.S. dealers. The tendency of the few remaining American manufacturers to sell primarily through their own sales forces has forced many independent dealers to depend on foreign manufacturers for products and parts and supplies.

This dependence on foreign suppliers for products has given the manufacturers inordinate bargaining power. Gradually, abusive practices by foreign manufacturers have made it more and more difficult for the small office machine dealer businessmen to remain in business.

Last year, and I cite and will introduce into the record today, Mr. Chairman, for all to see and view, the testimony last year in the Commerce Committee, wherein the testimony from dealers established an estimated loss of $30 million annually, with bankrupt-

cies and several financial losses of major importance, and certainly this was not an uncommon occurrence.

The problems run the gamut from inadequate supply of parts for servicing to arbitrary contract terminations.

Mr. Chairman, dealers on an individual and collective basis through the National Office Machine Dealers Association have attempted on a number of occasions and through a number of remedies to have their problems addressed. Dealers have sought to negotiate directly with the corporate executives of both foreign and in some cases domestic firms without success.

In the foreign area, they work through the U.S. department officials with no success. They have also asked the U.S. Trade Representatives for assistance. However, the Trade Representatives could not help, because the firms operated through their U.S. subsidiaries, and the U.S. trade agreements do not apply.

Requests for action by the Federal Trade Commission were also unsuccessful. The FTC said it was not within their jurisdiction. The existing legal remedies afford little hope to a financially troubled dealer. The Uniform Commercial Code has not been helpful to dealers, nor has the State contract law. Often the contracts are not written, and the statute of fraud applies to an action brought by the dealer. Dealers have rarely been successful in the courts. In any event, dealers simply cannot afford the costs of a drawn out legal battle.

Mr. Chairman, this bill is patterned after the Automobile Dealers' Day in Court Act that was successfully passed by the Congress several years ago, and it is intended to aid the small equipment dealer in negotiating with very large and very powerful suppliers.

This country must do something to preserve and strengthen the small office machine dealer. The Office Machine and Equipment Dealers' Act would afford a dealer a just remedy through the Federal courts to deal with abuses arising out of dealership agreements. It would impose a standard of good faith on the dealer and the manufacturer alike, and require that each act in a fair and equitable manner toward the other.

The bill could allow dealers and manufacturers to bargain more equally in the negotiating of sales quotas and other terms in the dealer-supplier contracts. It would enhance communication between the dealers and the manufacturers. Finally, it would give manufacturers an incentive to work out problems with dealers directly via arbitration if necessary rather than to seek to resolve them through costly court suits.

I would like to thank you, Mr. Chairman, for scheduling this hearing. I look forward also today to the testimonies pro and con on the measure that is before us.

Thank you very much.

Senator KASTEN. Thank you, Senator Exon.

Senator, without objection, the testimony from last year's hearing will be made part of the record.

Senator EXON. Mr. Chairman, that includes both the hearings before this Commerce Committee and also the hearing before the Judiciary Committee.

Senator KASTEN. Without objection, that information will be included as part of the record.[1]

I am pleased now to introduce our first witness, Hon. George Douglas, Commissioner of the Federal Trade Commission. Mr. Douglas.

STATEMENT OF HON. GEORGE DOUGLAS, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. DOUGLAS. Thank you, Senator Kasten.

I was previously unaware that I would be limited to 5 minutes, so rather than reading my statement, I will attempt to summarize it.

The Federal Trade Commission has examined this bill as well as its predecessor bills that have appeared over the last 2 or 3 years. Consistently, the Federal Trade Commission has found these bills to be special interest legislation with no benefits to the consumer and no benefits to competition. As such, the Federal Trade Commission and each Commissioner, with our diverse viewpoints, has consistently opposed this legislation, and we oppose the bill which is before you today.

Our analysis indicates that the bill is in large measure duplicative of existing law. It duplicates the Uniform Commercial Code protections which currently govern contract law in the States. Second, it duplicates well founded common law principles. In most instances that we have been able to see, the alleged abuses that have arisen in this area are matters of breach of law, breach of contracts, and this is certainly a matter that is susceptible to being treated in the State courts.

However, if it were only that, the legislation would not be quite so troublesome to the Federal Trade Commission. In addition, the legislation establishes special provisions which should apply to commercial relationships between suppliers and dealers. Now, these special relationships connote particular advantages to dealers, and would tend to, we think, erect barriers to entry, and tend to infringe upon competition in the retail market for office equipment.

Particularly, the legislation would make it more difficult for a manufacturer to seek out and to obtain the most efficient dealer network, the network that could most efficiently market the product at the lowest price. It makes it more difficult to establish new dealers, because a 60-day notice must be given in many instances.

Second, it would make it very costly in many instances to terminate dealers, and while the bill purports to have protection to allow the supplier the privilege of terminating dealers that are not performing, in my judgment, there would be a large gray area in which a good dealer may not be replaced by a better dealer.

The result of these kinds of restrictions would be basically anticompetitive. It would freeze existing dealer network. It would make it costly for new firms to enter the market and establish efficient distributorships, and it would tend to create local monopoly power, and restrict intrabrand competition and interbrand competition,

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[1] See Commerce and Judiciary Committee printed hearings entitled "Retail Dealers Agreement Act" serial Nos. 97-80 and 97-90.

thus possibly raising the price of the equipment which is sold at retail.

We do not believe the legislation would be beneficial to small business. Quite to the contrary, the burdens that this would place upon manufacturers establishing efficient supply networks might encourage them to not utilize independent dealers, but rather establish their own distributor system through franchise or forward integration, such as has been done by IBM and Xerox.

In short, the Commission has examined this legislation and has found it to be anticompetitive. We do not believe that the abuses that have been chronicled in previous hearings are such that would require the legislation, and we oppose it.

Thank you, Mr. Chairman. I would be happy to answer any questions you might have.

[The statement follows:]

STATEMENT OF HON. GEORGE W. DOUGLAS, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. Chairman and Members of this Subcommittee, I appreciate this opportunity to appear before you today on behalf of the Federal Trade Commission to express the Commission's views on S. 286, the "Office Machine and Equipment Dealers' Act."

Like other special interest legislation recently proposed,[1] S. 286 is designed to protect office product retail dealers in a variety of ways. The bill codifies as federal law, well-established common law principles regarding the duty to deal in "good faith" with respect to contractual obligations.[2] S. 286 also establishes a new set of dealer rights and supplier obligations triggered by various changes in a supplier's marketing practices that might adversely affect a dealer. These rights and obligations include: (1) the supplier's obligation to offer a terminated dealer "fair and reasonable compensation for the value to the dealership of the dealer agreement, including a reasonable amount for goodwill"; [3] (2) the supplier's obligation to make the compensation offer "in writing not less than sixty days before the intended date of termination"; [4] and (3) the dealer's right to seek damages, injunctive relief, or other equitable relief in federal court for any violation of the Act.[5]

While the Federal Trade Commission is committed to protecting franchisees, distributors, and dealers from unfair trade practices, the Commission is opposed to enactment of S. 286 for two principal reasons. First, existing law more than adequately protects dealers from such practices. Second, the bill may be anticompetitive.

Office product dealers are currently provided with sufficient legal redress for unfair trade practices. Dealers already have the right and the ability to protect their investments by contract. Common law, applicable in virtually every state, and existing state statutes provide time-tested remedies for proven transgressions involving the duty to deal in good faith. Moreover, even if a dealer fails to negotiate adequate contractual protection, private legal remedies for business torts provide redress for serious abuses. In addition, the federal antitrust laws enforced by the Federal Trade Commission, the Department of Justice, the state attorneys general, and by affected private parties provide protections and safeguards against anticompetitive or other unfair business practices. Finally, there is no evidence that the plethora of existing legal protections is inadequate to provide recourse for dealers subjected to supplier abuses. The volume of claims generated by this legislation would further burden the federal courts without any apparent benefits to the public. Thus, there is no sound basis for enacting this legislation.

The provisions of S. 286 may also be anticompetitive. Consumers may be denied the benefits of increased intrabrand competition because the bill will increase the costs associated with terminating existing dealers and establishing new dealers. The bill will tend to create market inefficiencies and increased costs in maintaining a

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[1] H.R. 1159, 98th Cong.; H.R. 4009, and H.R. 7106, 97th Cong., the "Office Machine and Equipment Dealers' Agreement Act," among others.

[2] Title I, sec. 101, pp. 5–6.

[3] Title II, sec. 201(a), p. 7.

[4] Id.

[5] Title III, sec. 301(a), p. 8.

viable distribution network. Increased costs to the distribution system are likely to be passed on to consumers.

Under S. 286, manufacturers and distributors who heretofore exercised broad independent business judgment in determining or modifying their marketing policies will find themselves unduly restricted by a statute requiring them to provide advance notice and to compensate terminated dealers for the "privilege" of making legitimate business decisions. The compensation provision, moreover, requires distributors to offer compensation to terminated dealers for goodwill, a requirement not found in any other federal legislation.[6] Such relief would constitute a novel approach to terminating dealers and would therefore invited litigation of issues that have, until now, been restricted from the federal courts. It would also alter the expectations of parties who have already negotiated dealership agreements.

This environment may result in suppliers insisting on strict territorial restrictions and limitations in dealership agreements, thus limiting the suppliers' obligations to provide notice to pay conpensation. Suppliers may also tend to spend greater resources in policing territorial limitations in order to prevent dealers from unilaterally expanding their market areas. Alternatively, suppliers may decide to integrate forward into the retail distribution of their own products, simply to avoid the loss of managerial prerogative that this bill entails. S. 286 invites this result by specifically excluding franchisees from the definition of "dealer." [7] The bill, therefore, does not apply to franchise agreements. Distributor resources expended for policing territorial limitations or integrating forward may reduce substantially distributional flexibility, innovation, and efficiency.

The bill would create significant barriers to entry where few now exist. Presently, suppliers can easily add or change dealers. The substantive rights and procedural safeguards in S. 286, however, will make it more difficult for suppliers to terminate dealerships, giving existing dealers some degre of market power to raise prices without fear of new entry and increased competition. While suppliers may eventually be able to overcome some of these increased barriers by designing, implementing, and administering distribution systems that minimize legal risks and obligations, this cannot be acomplished without substantial cost to the distrubution system (e.g., execution of written short-term dealer agreements; definition of narrow market areas for each dealer; efforts to document adequate grounds for terminating or refusing to renew existing agreements; and expenses for litigation associated with the administration of that network and with adjudication of questions of "good faith," "reasonable compensation," and "goodwill").

Although one section of S. 286 states that the antitrust laws would take precedence over the legislation,[8] the bill nevertheless may result in decisions that conflict with the orderly and effective application of the antitrust laws. For example, an antitrust defendant might claim that a restraint on intrabrand competition was justified, not because it furthered interbrand competition, but because the supplier had no alternative under S. 286.

Increasing the burden on competition and consumers may be justified when it is reasonably necessary to achieve some other policy objective that provides equal or greater social or economic benefits than the harm it causes. That policy objective, however, does not appear to be present in this instance. Enactment of S. 286 will impede competitive processes and result in higher prices. The Commission is therefore opposed to enactment of this legislation.

Mr. Chairman, that concludes my prepared remarks. I will be pleased to answer any questions that you may have.

Senator KASTEN. Am I correct in that the Commission unanimously opposes this legislation?

Mr. DOUGLAS. That is correct, Senator. You may have observed in the operation of the Federal Trade Commission that we very seldom are unanimous on anything. We have a broad diversity of

[6] The Petroleum Marketing Practices Act requires that when franchisors receive compensation from a governmental body pursuant to the power of eminent domain, the franchisor fairly apportion such compensation, including any award for goodwill, between itself and the franchisee. 15 U.S.C. § 2802(d)(1) (Supp. V 1981). The act, however, does not mandate, as S. 286 would, that there be any compensation for goodwill. Moreover, other Federal legislation that deals with condemnation or ratemaking has expressly excluded goodwill as a factor to be considered in awarding compensation. See, e.g., 16 U.S.C. § 807(a) (1976) (condemnation); 33 U.S.C. § 527 (1976) (same); 49 U.S.C. §§ 316(h), 907(c), 1006(c), 10701(d), (1976) and Supp. V (1981) (ratemaking).

[7] Definitions, sec. 2, p. 2.

[8] Title III, sec. 303, p. 9.

viewpoints in the Federal Trade Commission, but we are unanimous in our opposition to anticompetitive legislation of this sort.

Senator KASTEN. It is my understanding that the Justice Department and other parts of the administration have taken a position pro or con on this legislation.

Mr. DOUGLAS. I have seen communications from the Small Business Administration and from the Department of Justice to the House committees opposing the House version of the legislation which closely parallels this. It is my understanding that they do oppose the legislation, yes.

Senator KASTEN. We will include as part of the record whatever opinions they or other agencies might have.

A group of private economists issued a statement evidently in opposition to S. 286 for some of the same reasons that you mentioned. Walter Adams Kenneth Arrow, Walter Heller, Frederic Scherer, and some others. Is it common that a group of economists like this would agree on any given policy issue?

Mr. DOUGLAS. It is rather remarkable that we do have this diverse list of very distinguished, well-known national economists who have unanimously opposed this legislation. As I look at the same list, it includes very well-known economists whose general policy predilections are also divergent, somewhat similar to the predilections and philosophies of the Federal Trade Commissioners, and they, too, have unanimously opposed this legislation.

Senator KASTEN. Senator Exon.

Senator EXON. Mr. Douglas, in your remarks you indicated that you felt that this bill would prevent a manufacturer from seeking out and maintaining a dealer organization. Could you amplify on that a little bit? Certainly the legislation is not intended to prevent seeking out establishment of new dealers so long as the manufacturer who is basically in charge of the granting of the franchise in the initial instance treats the first dealer in a fair and equitable manner.

You are familiar, I think, with the fact that the bill indicates that notice has to be given for the establishment of a new dealership, but all that we are trying to do in this bill is to recognize and realize that the small office machine dealer needs some degree of protection, especially as outlined in my opening remarks, with the advent of foreign competition.

Let me tell you, and for the record, in case you are not familiar with it, Mr. Douglas, the main thrust of this legislation is, as I indicated in my opening remarks, the fact that foreign manufacturers have taken over such a substantial portion of the small office machine dealers' market.

Originally, we tried to draw this bill so that it would be directed to and control only foreign suppliers or through their subsidiaries in the United States. We found that that was not possible under the Constitution, so we had to broaden it to cover all facets of the business, including the important domestic sector of the manufacturing industry.

From your position on the Federal Trade Commission, are you familiar with what you consider any abuses or unfair treatment of office machine dealers from foreign manufacturers?

Mr. DOUGLAS. Senator, I have read the record of the hearings on the companion bill in the House, and the testimony of the small business people, the office equipment dealers who have presented testimony both this year and in previous years. As I mentioned in my statement, most of the complaints that have been raised appear to be breach of contract matters, which are not the kinds of issues that are appropriately dealt with by the Federal Trade Commission or by Federal law, in my judgment.

Senator EXON. What role do you think the Federal Trade Commission would have if S. 286 became law?

Mr. DOUGLAS. As to what, sir?

Senator EXON. What role do you think the Federal Trade Commission would have in implementing S. 286 if it would become law?

Mr. DOUGLAS. In my understanding, it would have no direct involvement in implementing this legislation.

Senator EXON. Exactly. I wanted to make that point. So you concur that S. 286 would not bring the Federal Trade Commission into any kind of a referee role?

Mr. DOUGLAS. That is correct. Our general position is in advocating the public interest of fair and vigorous competition.

Senator EXON. I wanted to make that point, Mr. Chairman, because one thing that those of us who are backing this bill wanted to make clear, we do not want, we do not seek, we think it would be wrong to have any regulatory agency of the Federal Government involved whatsoever. That is the last thing we want.

What this bill simply does, once again, is to provide for defining the relationships between a manufacturer and a dealer, whether it is foreign or domestic, and provides cases of remedy when good faith has not been evidenced by either party.

I have no further questions. Thank you, Mr. Douglas.

Senator KASTEN. Mr. Douglas, thank you very much.

[The following information was subsequently received for the record:]

STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to submit for the record the views of the Department of Justice on S. 286, the "Office Machine and Equipment Dealers' Act." For the reasons outlined below, the Department opposes enactment of the bill.

Briefly, the bill is designed to prevent a variety of alleged abuses involving the formation, performance and termination of dealer agreements by suppliers in the office machine and equipment industry. Since most such abuses are already covered by existing state law, enactment of the bill for the most part would be unncecessary, would serve to strain further our overly burdened federal court system, and would constitute an unwarranted invasion by federal lawmakers of matters more traditionally left to the states. While the bill would create some new restrictions on office products suppliers in their contractual arrangements with dealers, there seems to be no reason to treat suppliers in this industry differently from those in other industries. Moreover, as is most often the case with special interest legislation and federal government interference in the marketplace, the bill's new restrictions would have anticompetitive effects and produce other economic inefficiencies that are harmful to consumer welfare.

SUMMARY OF THE LEGISLATION

Title I of the bill requires a manufacturer, distributor or wholesaler (i.e., a "supplier") of office products,[1] who enters into a dealer agreement [2] with a dealer,[3] to act in "good faith" in (1) presenting, describing, negotiating, performing or complying with the terms of the agreement and (2) terminating, cancelling or refusing to renew the agreement. No corresponding obligation of good faith is imposed on the dealer. "Good faith" is defined as the duty of parties to a dealer agreement to act in a fair, equitable manner toward each other so as to provide each party freedom from coercion, intimidation, threats of coercion or intimidation, fraud or unconscionable conduct by the other party. The bill provides, however, that reasonable recommendation, endorsement, exposition, persuasion, urging, or argument shall not be deemed to constitute lack of good faith.

Title I also requires the supplier (1) to furnish the dealer on a timely basis any office products (or any part, reference manual, or schematic related to office products), (2) to provide sixty days notice to the dealer when establishing a new dealership in the area (if the dealer agreement so stipulates and if the agreement specifically defines a market area), (3) to allow the dealer or prospective dealer to be accompanied by counsel or other representative to any meeting between the parties for the purpose of discussing the agreement or prospective agreement, and (4) to allow the dealer the right of free association with other dealers for any lawful purpose.

Title II of the bill allows a supplier to terminate a dealer agreement only if notice is given in writing at least sixty days prior to termination and the dealer is offered "fair and reasonable compensation for the value to the dealership of the dealer agreement, including a reasonable amount for goodwill." This provision, however, would not apply to termination "for just, good or significant cause." Title II also authorizes (but does not require) the parties to include in the agreement or otherwise formulate in writing a provision requiring arbitration of what is "fair and reasonable compensation." Arbitration would generally be subject to title 9 of the United States Code (which governs arbitration). The bill specifies, however, that termination cannot precede the outcome of the arbitration proceeding and that the prevailing party in arbitration shall receive attorney fees and costs.

Title III of the bill, i.e., sections 301–05, contains miscellaneous provisions. Section 301 allows any party affected by a violation of the bill to bring an action for damages, injunctive relief or other equitable relief in federal district court; the prevailing party would recover reasonable attorney fees and costs. Section 302 would declare void any provision purporting to bind a dealer to waiver of the provisions of the bill. Section 303 states that nothing in the bill shall be construed to modify or repeal the federal antitrust laws. Section 304 states that nothing in the bill will supersede the right of any state to enact or enforce any law which provides additional or stronger standards, criteria or remedies than those in S. 286. Finally, section 305 makes the bill applicable only to dealer agreements entered after its enactment.

DISCUSSION

The proponents of the bill argue that dealers in the office products industry are treated unfairly and inequitably, most often by foreign suppliers who, unlike most of their American counterparts, use independent dealers to distribute their goods.[4] The dealers, it is alleged, have "at best limited bargaining power" with respect to their suppliers.[5] The bill is designed to strengthen the position of the small office machine dealer [6] and to end unfair practices such as arbitrary contract termina-

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[1] "Office product" means any physical object or office machine software that is designed primarily for use in an office environment and that has a retail price greater than $100 per item, except for "carpets, chairs, couches, dental equipment, desks, dividers, draperies, lighting or lighting fixtures, medical equipment, office accessories, plants, sofas, stands, storage systems, tables, telecommunications equipment, textile products" or "furniture designed specifically for integrated use with office machines." Products that are covered by the bill include typewriters, photocopiers, electronic cash registers and calculators, word processing equipment, and computers. See, Congressional Record S719 (daily ed. January 31, 1983) (statement of Sen. Exon).

[2] "Dealer agreement" means any written or oral agreement or contract between a supplier and dealer that purports to fix the legal rights and liabilities of the parties.

[3] "Dealer" means an entity, other than a franchisee, residing in the United States or a territory thereof operating under the terms of a dealer agreement and primarily engaged in the business of selling any office product of a supplier to an end-user of the product.

[4] *See* Senator Exon statement, *supra*.

[5] *Id.*

[6] *Id.*

tions, unrealistically high sales quotas, false product claims by manufacturers, unexpected market saturation by new dealers, and lack of compensation for abrupt contract cancellations without clause.[7]

We have no reason to believe that abusive contractual practices occur in the office products industry to any greater extent than in other industries, or that suppliers in this industry have substantially greater bargaining power vis-a-vis their dealers than suppliers in other industries. In this context, we are unware of any valid reason why dealers in this industry should be treated differently from dealers in other industries. Moreover, when legislation, such as this bill, contemplates not only significant changes in the relevant substantive law but also a fundamental shift in the traditional relationship between the state and federal government with regard to pronouncement and enforcement of that law, the proponents must carry a substantial burden to show that the legislation is necessary. The anecdotes that we have seen which purport to justify the bill simply are not sufficient to meet that burden.

Abusive practices in contractual dealings are already covered by state laws that apply to all industries. In this regard, the Uniform Commercial Code, adopted in every state,[8] requires that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[9] It also provides that "unconscionable" contractual provisions are unenforceable.[10] Moreover, the U.C.C. is supplemented by general principles of law and equity, such as principles of estoppel, fraud, misrepresentation, duress, coercion or mistake.[11] In *Shell Oil Co.* v. *Marinello*, 63 N.J. 402, 307 A.2d 598 (Sup. Ct. 1973), *cert. denied*, 415 U.S. 920 (1974), for example, a state court declared void as against public policy a supplier's contractual right to terminate without cause. States also have enacted legislation designed to prevent what they believe to be abusive contractual practices.[12]

In those instances when alleged abusive practices have anticompetitive aspects, the Sherman and Clayton Acts are available to challenge them.[13] Also, coercion, intimidation and other abusive practices are subject to Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or unfair methods of competition.[14]

Apart from existing legal remedies, the free market itself serves to police attempts by suppliers to abuse their relationships with their dealers. Suppliers have every incentive to promote the sales of their products by their dealers. Because their interest would not be furthered by frustrating their dealers and their dealers' sales efforts, one would not expect suppliers intentionally to engage in abusive activities. In fact, suppliers will compete with one another to induce dealers to maximize sales of a particular line of product. If one supplier has a reputation for engaging in conduct harmful to its dealers, dealers would likely not actively promote that supplier's products (if the dealers handled it at all). Rather, those dealers would promote the products of suppliers that offered better deals and had better reputations for protecting the interests of their dealers. In the long run, dealers simply should and will cease doing business with suppliers whose performance is inferior or detrimental to their sales efforts, and carry instead the products of other suppliers.

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[7] *Id.*

[8] Louisiana, however, has adopted only parts of the U.C.C.

[9] U.C.C. § 1-203. "Good faith" is defined generally as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201. In Article 2, regarding sales contracts, its definition is expanded to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103. The requirement of good faith is specifically included in numerous other U.C.C. provisions. Under § 2-305(2), for example, when a contract requires a seller to set a price, it must be set in good faith. Under § 2-306(1), when a contract measures the quantity of output by output of the seller, the amount required is to be determined in good faith. See also, U.C.C. §§ 1-203 (comment), 2-311(1), 2-403(1), 2-615(a), and 2-706(5).

[10] The determination of "unconscionability" involves whether, in light of the general commercial background and commercial needs of the particular trade or case, the clause involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. U.C.C. § 302, comment 1.

[11] U.C.C. § 1-103. This is true unless the particular principle of law is replaced by a U.C.C. provision. *Id.*

[12] See e.g. N.J.S.A. 56:10-5, which prohibits a franchise from being terminated without good cause.

[13] See 15 U.S.C. §§ 1 et seq. Each state generally supplements these federal antitrust laws with state antitrust laws.

[14] 15 U.S.C. § 45 (1976). In this regard, the FTC has promulgated a rule that makes it an unfair or deceptive act in violation of section 5 for a franchisor to fail to furnish specified information to a prospective franchisee in an accurate, clear, and concisely worded, legible written document. FTC Disclosure Requirements and Prohibitions concerning Franchising and Business Opportunity Ventures, 16. C.F.R. §§ 436.1-.3 (1980).

Given the practical and legal remedies now available to protect parties against contract related abuses, the bill for the most part is unnecessary and would serve primarily to strain further an overcrowded federal court system. Moreover, while the bill would create new restrictions on a supplier's ability to engage in bargaining with its dealers, such restrictions would harm, not help, consumer welfare.

Suppliers generally attempt to lower costs of distribution. In this manner, they can lower the cost of their products to end-users so that they can effectively compete with other suppliers. Imposing restrictions on a supplier's ability to bargain with its dealers makes it difficult for the supplier to develop the most efficient, least costly distribution system. Such inefficiency undermines the basic goals of competition, which are the efficient allocation of society's scarce resources and enhancement of consumer welfare.

For example, the requirement in Title I of the bill that the supplier must furnish the dealer with any office product on a timely basis may significantly inhibit a supplier's effort to devise the most efficient system of distribution for its products.[15] This requirement would obligate a supplier of typewriters and computers, for example, to supply a dealer with all types of typewriters and computers that the supplier sells. The supplier may have decided, however, that the most efficient method of distribution is for one particular dealer to sell only typewriters, or only computers, or only computers of a certain type, and for other dealers to sell other specified products. By requiring the supplier to supply the dealer with every brand of computer and typewriter that the supplier sells, the bill undermines the supplier's attempt to create an efficient distribution system.

In addition, the bill's requirement that the supplier compensate a terminated dealer for the value of the dealership, including goodwill, would impede a supplier's ability to alter its distribution system to assure the system's maximum efficiency in the face of ever-changing economic circumstances.[16] This requirement could have the effect of prolonging dealerships that the supplier deems relatively inefficient and, hence, could impair the supplier's ability to select the most effective methods of distribution. Exacerbating this impairment is the fact that the bill requires sixty days notice before termination even when the dealer is compensated. This notice requirement further delays the supplier's attempt to switch to a more efficient method of distribution (e.g., to a more aggressive distributor).

The reaction of suppliers to the bill's restrictions may lead to further inefficiencies and, also may offset any benefits that dealers may expect to derive from the bill. If one accepts the bill's fundamental precept tht suppliers have excessive bargaining power, then the supplier can use that power to extract concessions from the dealer that would at least partially offset the bill's perceived dealer benefits. Moreover, extractions of these new concessions typically will be less efficient than the extraction of the previous concessions demanded; that it, the newer arrangement will impose higher transaction costs on one or the other, and most likely on both, parties. If it were more efficient, the supplier would have been implementing the concessions in this manner in the first place. For example, if a supplier with some bargaining power vis-a-vis its dealer can no longer exercise the power by freely terminating the dealer when the economic need arose, the supplier might instead choose to use its bargaining power to increase the prices of its products of to insist that larger inventories be carried.[17]

Another reaction by suppliers to the bill's restrictions could be the use of only large, established dealers, and the nonrenewal of existing dealers who are presently performing adequately but who are viewed as unlikely to expand their operations. Suppliers, rather than confront the possibility of law suits from numerous dealers, may desire to do business with a few, large dealers and develop loyalty from those dealers in return for exclusive territories. This result would be especially tempting in view of the bill's requirement that each dealership must be supplied with any office product. If the supplier must satisfy this requirement, it may decide to use only large dealers capable of efficiently handling all its products. By raising a supplier's cost of dealing with small dealers in this manner, the bill not only will be detrimental to small dealers, but it also may deter suppliers from using numerous

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[15] See section 101(3) of the bill. We presume that this requirement was intended to apply only to office products normally supplied by the supplier. We strongly object to any interpretation that the supplier must also supply products of other suppliers.

[16] See section 201(a) of the bill. Determination of this value would undoubtedly spawn a substantial amount of attorney and court time. The bill itself offers no guidance in this regard.

[17] Even if suppliers are unable to exert bargaining power to obtain concessions that offset perceived dealer gains from the bill, the dealer gains would not necessarily translate to increased consumer welfare. Rather, the gains probably would be realized by the dealers at the expense of suppliers and consumers.

small dealers to market different lines of products even when that option is more efficient (from society's standpoint) than the use of a few, large dealers.

Of course, at the extreme, the bill may induce some suppliers to convert from distribution by independent dealerships to company operated distribution. The bill's proponents urge that many suppliers have already taken this step.[18] Those suppliers who have not yet converted have undoubtedly concluded that, for them, the use of independent dealerships is more efficient. Because of the additional costs (that do not produce any offsetting efficiency gains) imposed by S. 286, however, this conclusion may change.

Moreover, some suppliers will not be large enough to integrate vertically into distribution. These suppliers will be at a competitive disadvantage to their larger, integrated rivals since only the nonintegrated suppliers would be subject to the requirements of the bill. This practical inability to integrate, and the competitive disadvantage that the bill would impose on nonintegrated suppliers, may also apply to potential new entrants, who often need independent dealerships to establish themselves in a market. Consequently, new entry by suppliers may be inhibited—an anticompetitive result that is made even more likely by the fact that the bill is prospective in nature.[19]

Because of this prospect, all of a new entrant's dealer agreements, but only a relatively few agreements of present suppliers, would be subject to the bill's restrictions.

In addition to producing anticompetitive results and inefficiencies in the distribution of suppliers' office products, we are concerned that the bill could create serious compliance problems. To the extent the bill's requirement that suppliers act in good faith toward dealers is intended to go beyond contractual provisions and existing legal requirements, it presents serious questions about when a supplier is in compliance. For example, under the bill, if a supplier terminates a dealer with cause, it would not be subject to the compensation requirement of Title II of the bill but it could still be liable for failure to use "good faith" in the termination. It is not clear what acts would constitute termination with cause but in bad faith, and how damages resulting from such acts would be determined.

CONCLUSION

S. 286 is special interest legislation that would constitute unjustifiable federal government interference with private contractual arrangements in the office products industry. While the bill attempts to remedy alleged contractual abuses, such abuses can generally be handled adequately under existing law. To the extent the bill creates new restrictions on office products suppliers in their bargaining with dealers, we see no valid reason why suppliers in this industry should be treated any differently from suppliers in other industries. Moreover, some of the bill's restrictions would have anticompetitive results and create other inefficiencies that can work to the detriment of suppliers and consumers. Also, the bill could create compliance problems and lead to increased litigation in the already overburdened federal court system concerning issues that are often more appropriately considered under state law. In short, there is simply no justification for federal government interference or special interest legislation of this type. Accordingly, the Department of Justice objects to S. 286 and recommends against its enactment.

Mr. Chairman, I appreciate the opportunity to submit these views of the Department of Justice for the record, and the Department would be happy to respond to any specific questions that the Members of the Subcommittee may care to address to us.

U.S. SMALL BUSINESS ADMINISTRATION,
Washington, D.C., January 3, 1984.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Subcommittee on Consumer Committee on Commerce, Science and Transportation, United State Senate, 110 SHOB, Washington, D.C. 20510

DEAR MR. CHAIRMAN: This letter is in response to your request for my comments on S. 286, the "Office Machine and Equipment Dealers Act." At the outset, I want to stress that this letter reflects only the views of the Office of Advocacy of the Small Business Administration, and that we defer to the Department of Justice for the Administration's position on this bill.

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[18] *See* Senator Exon statement, *supra.*
[19] See section 305 of the bill.

The bill is an attempt to remedy what some dealers of office equipment view as abusive practices of office equipment manufacturers. If enacted, the bill would mandate a "good faith" standard of dealing for suppliers in their interactions with retail dealers. In addition, suppliers would be required to provide existing dealers with 60 days advance notice of intent to establish a new dealership within an existing dealer's territory. A sixty-day notice period would also be required prior to the termination of an existing dealer who would be entitled to receive "fair and reasonable compensation for the value of the dealer agreement to the dealership including a reasonable amount for goodwill." In some circumstances, this amount will be determined by arbitration.

I do not support this bill. It is an example of protectionist legislation that is not only unnecessary but anticompetitive as well. Existing law provides a cause of action for business dealings that are regarded as unfair trade practices. In addition, common law imposes a duty to deal in good faith in all business transactions. Manufacturers guilty of leveling abusive and illegal practices against their dealers can be sued under tort, contract, and, in some cases, antitrust law. The legislative approach embodied in S. 286 is counterproductive and would result in unwarranted government interference in the contractual relationships between office equipment manufacturers and their dealers. Purely business decisions as to the number, identity, inventory, and compensation of dealers would become subject to Federal court review. This would only serve to aggravate the ever increasing demand on our already overburdened Federal judicial system.

Moreover, the bill would replace the current competitive method of selecting retail distributors with a non-competitive method by which existing dealers could prevent new dealers from entering the market. In addition to the limitations this would place on new or existing dealers seeking to expand, it would eventually create incentives for manufacturers to vertically integrate and open their own dealerships, thereby further limiting opportunities for the establishment of small business outlets.

The bill would restrict the increasingly abundant business opportunities available as a result of the technological advancements in the office equipment market. This concern was echoed by several small business representatives who we recently contacted. A representative of the National Office Products Association (which represents 4,800 dealers) views the bill as an obstacle to market entry by his membership. A study commissioned by that organization revealed that the office machinery market will grow at an annual rate of 14 percent, amounting to an $83 billion market by 1990. I do not favor legislation which limits the ability of new dealers to take advantage of this considerable growth opportunity.

The office machinery distribution network is comprised of approximately 30,000 small retailers of office equipment. By providing existing dealers with a forum and 60 days opportunity to object to new dealers, the bill invites horizontal efforts to restrict growth in this industry. Given the procedures provided for in this bill, the current population of dealers is likely to remain static and eventually decline as manufacturers, faced with delays and the possibility of judicial intrusion into their dealer selection process, turn to in-house distributors. Legislating exclusionary market power to this group at the expense of all potential new entrants is poor competition policy because it denies small businesses the ability to grow and expand in this competitive market. For these reasons, among others, I do not support S. 286. If I can provide any further assistance in developing the small business perspective on this legislation, please let me know.

Sincerely,

FRANK S. SWAIN,
Chief Counsel for Advocacy.

Senator KASTEN. Our next panel includes Mr. Kuchta, Mr. Ayres, Mr. Doss, Mr. Nelson, and Mr. Goldberg. We are pleased to have you here testifying on behalf of the Office Machine and Equipment Dealers' Act, S. 286. Our first witness will be Mr. John J. Kuchta, president, Lincoln Office Equipment Co., Lincoln, Nebr. Mr. Kuchta.

Senator EXON. Mr. Chairman, if I might welcome Mr. Kuchta here, we are old friends. We are old associates. We are old competitors in the small office equipment business. Several years ago,

when I was involved in the private sector, we were strong competitors, friendly competitors in Lincoln, Nebr.

I would like to say, Mr. Chairman, that the reason that this Senator introduced this bill primarily was at the urging of Mr. Kuchta, who is the president of NOMDA, an outstanding local businessman, an outstanding local leader in the office machines industry in America.

John, we are delighted to have you here this morning. I just wanted to welcome you as a friend, and you are one of my constituents. Glad to have you.

STATEMENTS OF JOHN J. KUCHTA, PRESIDENT, LINCOLN OFFICE EQUIPMENT CO.; ROBERT C. GOLDBERG, COUNSEL; RICHARD NELSON, PRESIDENT, OHIO BUSINESS MACHINES, INC.; JAMES H. AYRES, PRESIDENT, GILSON-AYRES, INC.; AND HENRY E. DOSS, PRESIDENT, DOSS-PRICE OFFICE SYSTEMS, INC.

Mr. KUCHTA. Thank you, Senator, Mr. Chairman. We are glad that Senator Exon is in Washington now rather than competing against me in Lincoln.

The National Office Machine Dealers Association is a group of small business equipment and systems dealers, about 6,000 members strong. That number is a little misleading, because it represents the number of business equipment firms nationwide that are members of the association. Primarily, the owners of these businesses are family members of a family-owned business, typically second generation.

The mission and purpose of NOMDA, the National Office Machine Dealers Association, is to do for the dealer what he is unable to do for himself. NOMDA represents the vast majority of business equipment and systems dealers throughout the Nation, and is an international organization as well.

I think it appropriate to discuss what a typical dealer is and what he does. He is in the business of really serving all businesses in the United States, and he offers sales, service, and support of products and services the products that he sells. He sells virtually everything and anything for the office.

He is an effective and cost-efficient marketing arm, and that is why manufacturers utilize dealers to distribute their products. Many of the domestic manufacturers that are experimenting with dealer programs today are utilizing dealers because of their cost efficiency.

IBM, Xerox, NCR, Wang are all domestic manufacturers that are presently using the dealer marketing channel as a distribution arm.

They are a small business, typically 10 to 15 people. They do under 1 million dollars' worth of volume. So that gives you kind of a parameter on what the small business equipment and systems dealer is.

I think it is important to note as you listen to the testimony today that unlike most industries, in fact, all industries that I am aware of, the warranty on the products that we sell are passed on to the dealer rather than to the end user. As you listen to the testimony, I think this will bear significance. All the weight on per-

forming warranty is done by the dealer, and the warranty is passed on to the dealer, not to the end user.

Obviously, a dealer has many responsibilities because of this. The problems that we are going to discuss today didn't exist 10 years ago, and that's because of the predominance of foreign manufacturers in the marketplace over the last 10 years. The Japanese have virtually eliminated domestic manufacturers in various segments of the marketplace, including calculators, copiers, and now into dictation equipment, typewriters, and so on.

The problem that exists in the marketplace is the fact that since the warranty is passed on to the dealer, the dealer has really been the field test for these new products. The industry is a very competitive one, and in the manufacturers' rush to enter new products into the marketplace, they have done very little, if any, field testing.

Because of this and as a result of this, many faulty products were entered into the marketplace, but the dealer has to take the warranty responsibility, and at the dealer's expense, he made sure that his customer was taken care of. We feel that that is unfair, and that that should be righted.

The dealers really lose in two ways. One, they lose financially because of the expense of retrofitting the piece of equipment which is faulty, and second, there is a potential loss of customers. The one-sided and arbitrary agreements that the dealers are forced to sign typically include the warranty disclaimers that the dealer will take all the warranty responsibility.

NOMDA has for many years been publicizing what we call a model dealer agreement, and this is a contract between a manufacturer and a dealer. Basically, the model dealer agreement says that the manufacturer and the dealer will treat each other fairly and equitably. It also says they will mutually agree upon the standards of performance, the quotas that are established. It says that if I do my job, and pay my bills, I will be their dealer for that product, and then if there is a problem there will be an appeals board to handle the matter rather than costly litigation.

Over the last few years, NOMDA has lost hundreds of dealers, 782 dealers in the past year, resulting from bankruptcies and reduced profits.

I was interested in Mr. Douglas's comments. We have visited with the FTC and the SBA as well as the U.S. Trade Representative. They tell us that the remedies under their jurisdiction are not appropriate to the problem. Thus S. 286. Ninety-nine percent of the dealers in a recent survey of 13,000 dealer members responded that they believe that manufacturers and dealers should treat each other fairly and equitably, and 94 percent of them responding support this legislation.

In summary, the NOMDA board of directors at a recent convention a few weeks ago where over 15,000 business equipment dealers attended unanimously support this legislation and urge your speedy adoption of this act.

[The statement follows:]

STATEMENT OF JOHN J. KUCHTA, PRESIDENT, NATIONAL OFFICE MACHINE DEALERS ASSOCIATION

Good morning. My name is John Kuchta, President of Lincoln Office Equipment Company in Lincoln, Nebraska. This year I hold the position of President, one of four national officers, in the National Office Machine Dealers Association.

For 26 years, Lincoln Office Equipment has been a reliable supplier of quality office machine products as well as service to end-users in our community. We carry a fairly wide range of products, including copiers, typewriters, calulators, word processing equipment, and small computers, and represent both foreign and domestic manufacturers, such as Canon, Minolta, Savion, Olivetti, Victor, and Lanier. With 65 employees, my business could be characterized as larger than average.

I appreciate this opportunity to provide you with some observations about the National Office Machine Dealers Association and the specific problems plaguing our industry. NOMDA is a nonprofit organization of over 6,000 member-owners of independent office machine companies, the majority of which are family-owned. Our members are located in all 50 States, as well as ten foreign countries. These independent dealers work together in a common effort, educating each other in the latest management, marketing, and technical procedures. The guiding principle of our association is "to help the dealer do that which he cannot do himself". Through NOMDA, a dealer learns how he can best operate and conduct his business.

Our membership represents approximately 70 percent of those independent dealers who primarily market office machines. These businesses carry lines of products ranging from desk top calculators to computers. Some dealers may carry a combination of products lines, as well as supplies or furniture. However, our association's major concern is office machines and equipment.

The small independent office machine dealer plays a very important part in the overall economy of the United States. Traditionally, the large domestic manufacturers whose name have become synonymous with the industry they dominate, have marketed their products directly through their own individual sales forces. As you might well imagine, these sales forces are fairly sizeable, and dealer competition with them is considerable.

However, the majority of the over 400 manufacturers of office equipment have seen the advantages of marketing through a network of independent dealers located in every State and locality in the country. These dealers have close relationships with other small businesses and consumers in their respective market areas. They have the capability to market a wide range of product lines, although their choice of products often governed by manufacturer marketing strategies for the area concerned.

In the last decade, more and more dealers have used their traditional typewriter/calculator businesses as a foundation to expand into such high technology areas as word processing and mini-computers, having added photocopiers to their line of products along the way. By selling their knowledge and service capabilities, these dealers have proven that they can compete effectively against those major manufacturers using a direct sales force. Their effectiveness has been demonstrated by the recent decision of some of these manufacturers, including Xerox, NCR, and IBM, to develop experimental dealer marketing networks. We believe actions such as these are simply another indication that marketing through dealers in the best route to higher sales and better service.

Our typical member is a small, independent businessman, continuing in the footsteps of his father and his grandfather before him. Average gross sales volume of our members range from $500,000 to $1,000,000 per year. Our typical member employs usually 10 to 15 people, with several devoted to the sales of the products. The majority of his employees, however, are dedicated to service and customer satisfaction for those products sold.

Before a dealer is successful, he has often invested considerable sums of money in his business over a long period of time. Usually, he purchases his products on net 30 days financing. All product warranties are transferred to him, obligating him to maintain sophisticated, up-to-date service facilities necessary for end-user satisfaction. A lease on a building, inventory, personnel, service vehicles and equipment, training, advertising and many other costs add up to a major investment for the dealer. Furthermore, he has the additional responsibility of paying bills as agreed, meeting established quotas, promoting the name and goodwill of the manufacturer and treating the supplier and end-user in a fair and equitable manner. One can see that the dealer has much at stake as he seeks to develop his business.

I would like to now take a few minutes to explain why we feel The Office Machine and Equipment Dealers Act is necessary. Incredibly, the problems which my

colleagues will discuss today did not even exist 10 years ago. The independent dealer, in attempting to develop that "right" mix of manufacturers he wishes to represent, can choose from among many. Increasingly, they are of foreign origin, particularly Japanese. There are very few U.S. companies producing office machines competitive with foreign firms in today's marketplace for dealer consumption. Some of these foreign companies are European, such as Adler-Royal, Facit, Hermes, Olivetti and Olympia. However, Japanese firms now provide the majority of dealers' product lines. These firms include such giants as Canon, Mita, Minolta, Ricoh, Sharp, Silver-Reed, Sony and Toshiba.

This entry of the Japanese into the office machine industry has had the effect of virtually eliminating American companies as a factor in dealer-sourced business, particularly in the eyes of those customers seeking lower volume, less costly machines. Not unlike our country's dependence on foreign oil, dealers today must look beyond our borders for viable products to market. In 1981, imports of business machines and parts from Japan alone totalled more than $1.63 billion. More than 70 percent of the "bread and butter" products sold by dealers such as photocopiers, duplicating machines, electronic cash registers, desktop calculators and typewriters, come from abroad.

A typical example of the events leading dealers to look to foreign manufacturers is found in the photocopier situation. In this case, the Japanese entry into the U.S. market was a direct result of a void created by the industry giants like Xerox. Small businesses could not afford large volume, high cost copying machines for their minimal use. Recognizing the opportunity this vacuum provided, Japanese and European firms began developing attractive, low cost machines for small volume usage. The first wave of these with their flashing lights, pretty colors, and fancy buttons flooded the country before their designs had even dried on the drafting tables. Realizing that innovations and new features were vital to maintaining a competitive edge, manufacturers began to introduce new products as rapidly as possible, leaving vital final product testing to be done in the end-user's establishment. To carry out this marketing strategy and at the same time minimize capital expenditures, the foreign firms looked for an existing marketing arm in the U.S. The independent dealer, who had previously demonstrated his abilities with typewriters and calculators, was the logical choice. In addition, dealers had already established service organizations, an extremely costly venture for a foreign manufacturer.

Over the past several years, Japanese and other manufacturers have been working to create a significant asset position for themselves in the U.S. marketplace as quickly and inexpensively as possible. This has been accomplished through a unique combination of product innovation, rapid introduction of products into the market, and competitive pricing. However, without the aggressive marketing and reliable service of the independent dealer, their success would not have even approached the level they currently enjoy. Dependence of dealers on foreign products without alternative sources of supply has resulted in these manufacturers acquiring inordinate bargaining power.

NOMDA, as the organization representing the majority of dealers in the industry, has made many attempts to put an end to these unfair manufacturer practices. We have found that a legislative remedy is the best, if not only, solution to our problem. Although many of the horrors experienced with copiers have diminished, the same problems are now occurring with computers and software.

For over a decade, NOMDA kept its members informed of unethical practices of manufacturers, defective equipment and one-sided dealer agreements. More than ever before, the future of the independent office machine dealer is being threatened by the predatory behavior of suppliers. Numerous attempts have been made by NOMDA to negotiate solutions to these problems. In a few cases, the results have been satisfying, but he vast majority of manufacturers have been totally uncooperative and persist in exploiting their dealer network.

Because of this limited success, NOMDA has recognized the need for development of a direct relationship with the principal executive officers of foreign manufacturers at their home offices. We are vulnerable when our contacts are limited to the managing American branch offices which often send an unrealistic picture of the American market to the home office. Because the recommended policies of these American offices are often not in the best interest of the independent office machine dealer, NOMDA has, for the past 5 years, arranged annual meetings in the Pacific Rim countries with the Japanese government, agencies and manufacturers. These meetings were arranged with the assistance of the Japanese Business Machine Makers Association.

The purpose of these meetings was for NOMDA to make a presentation on the current status of the market and emphasize the advantages of doing business

through an independent dealer network. Of more importance, we attempted to bring the serious problems concerning dealers to the attention of those who could change the existing situation.

In 1979, the NOMDA delegation met with the Japanese Equipment Manufacturers Association and the Japenese Business Machine Makers Association, as well as suppliers such as Canon, Sharp and Silver-Seiko. We provided information on our association, our mission and purpose and the product concerns of our members. (Exhibit A) [1] At these meetings we suggested the establishment of an industry "hotline" between the leaders of the Japanese office machine industry and the leaders of NOMDA. We were assured that this suggestion, along with the documented problems we discussed, would be looked into and action taken.

The following year we met with the Japanese Business Machine Makers Association again, the Ministry of International Trade and Industry, and manufacturers including Silver-Seiko, Minolta and Sharp. This time we presented our Model Dealer Agreement which we suggested be used for guidance in drafting dealer agreements. We also proposed a "new product information sheet" which contained 27 points dealers should be aware of before they can successfully market a product (Exhibits B). The responses we received were typified by a letter from the Ministry of International Trade and Industry dated July 11, 1980 (Exhibit C). Despite the comment that "Japanese business machine manufacturers have always paid close attention to improvement of their products and service", very little action has been taken by the manufacturers to date.

In 1981, we again met with the Ministry of International Trade and Industry, the Japanese Equipment Manufaacturers Association and the Japanese Business Machine Makers Association. Again, we contacted Minolta, Sharp, and Silver-Reed. Again we received assurances and promises. Yet, there still has been no visible change in the continued unfair treatment of dealers. Despite several years of attempted negotiation with the "source of power", one-sided dealer agreements are still offered on a "take it or leave it" basis, unfair quotas are still being set, and product performance is still poor. It seems that the response of these foreign suppliers is clear—they have the power to dictate the terms of their relationships with dealers, and plan to continue to do so.

The stage has been set. An environment exists in which relatively few, mostly foreign, manufacturers control a substantial share of the marketplace, and these suppliers, secure in their markets and dominance over the dealers, continue to treat their dealers unfairly. They have full knowledge that their dealers' options are severely limited, and exploit that knowledge to the hilt. What's more, fair treatment entails cost to the manufacturer, and it is not required by law. On the other hand, the small dealer has, over time invested substantial sums of money in his office machine dealership, and developed a name for the manufacturer. Unfortunately, with limited bargaining power against the big companies, he has no way of protecting this asset which a supplier can destroy at the drop of a hat through termination or non-renewal. What's worse, even success is not adequate protection to make this asset grow and prosper, as the supplier will often seek to use that success to further solidify its position in the marketplace at the dealer's expense. Over the last few years, NOMDA has lost hundreds of dealer members—700 in the past year—resulting from bankruptcies and drastically reduced profits caused by terminations and other abusive actions of suppliers. It is true that some of these failures are self-inflicted, however, the great majority can be directly attributed to manufacturers' practices.

Dealers have also attempted to take action in the courts to redress their grievances. Contractual disputes in the past have typically been resolved in such a fashion. Unfortunately, because of the unilateral nature of many dealership agreements, (a result of manufacturers wielding their considerable bargaining power), dealers have found that their interests are not sufficiently covered by these agreements, and, furthermore, that the courts are reluctant to go beyond the contracts in interpreting the relationship.

Moreover, the relevant provisions of common law as well as existing statutory laws are not sufficient to give dealers relief from the abusive practices of manufacturers. Numerous dealers have filed suits charging suppliers with violating the Sherman and Clayton Antitrust Acts as well as applicable laws dealing with fraud and deceptive business practices, with very little success. Cases which dealers may have won in district court are often overturned by courts of appeals leaving the dealer with a bankrupt business and enormous legal debts. Many office machine dealers make the choice to go out of business rather than risk the expense of a court

[1] The exhibits referred to have been retained in the committee files.

battle seeking relief under laws which do not address the dealer-manufacturer problem.

Through NOMDA, dealers have also tried—with no success—to seek the assistance of appropriate agencies of the U.S. Government with these problems. These agencies include the Federal Trade commission, the Small Business Administration and the Office of the United States Trade Representative. All three agencies informed us that the remedies available under their jurisdiction were not appropriate to the problems that needed to be addressed.

We are, therefore, left with our last option—legislation to require, once and for all, that office machine manufacturers treat their dealers in a fair and equitable manner. We strongly endorse the Office Machine and Equipment Dealers Act (S. 286) as a measure which assures the dealer an opportunity to secure a judicial determination as to whether an office machine manufacturer has failed to act in good faith in either complying with any of the provisions of his dealer agreement or in terminating, cancelling or not renewing the dealer.

This Act embraces, as its cornerstone, the imposition of a good faith standard on both manufacturers and dealers alike. By making it a violation of Federal law for an office machine supplier to fail to act in good faith in living up to the terms of a dealer agreement, we forsee an opportunity for dealers to attack problems which result from the manufacturer's overwhelming superiority in bargaining power and which seriously erode the dealership's competitiveness, such as:

1. Establishment of arbitrary and unreasonably high sales quotas, without any dealer input;
2. Not compensating dealers for retrofits (improvements after sales to the end-user, required to correct defects);
3. Refusing to reduce often considerable delays in the supply of parts, schematics, reference manuals and other product-related material needed by all dealers to support sophisticated office machinery.

Last year, NOMDA surveyed approximately 13,000 independent office machine and furniture dealers. Support of an Act such as S. 286 was overwhelming. The results showed that 99 percent feel that manufacturers and dealers should treat each other in a fair and equitable manner. Almost all (94 percent) showed their willingness to help NOMDA support the Office Machine and Equipment Dealers Act. This majority showed their support by becoming members of our Government Relations Committee, making presentations at local association meetings across the country and writing their Congressmen and Senators in support of the Bill. It is clear that dealers perceive a need for a standard of good faith to govern manufacturer treatment of dealers in the industry.

In summary, speaking as an independent office machine dealer as well as an officer of the National Office Machine Dealers Association, I wholeheartedly support S. 286. I would like to bring to the Committee's attention that a number of allied associations (Exhibit D-K) support NOMDA's stand, including:

1. Office Products Dealers Association.
2. Copier Dealers Association.
3. Independent Computer Dealers of America, Inc.
4. Data Terminal Systems Dealers Association.
5. Accounting-Machine Minicomputer Dealers Association.
6. Association of Cincinnati Time Equipment Distributors.
7. ISDA . . The Office Systems Cooperative.
8. National Association of Retail Dealers of America.

As long as manufacturers can protect their unequal bargaining position and avoid the obligations of good faith dealing, the problems discussed here today will not only remain, but will increase. The Office Machine and Equipment Dealers Act will equalize the relationship betweeen the dealer and his powerful overseas supplier. Passage of the Act would work to demonstrate to these suppliers the value of enhancing their dealer network and strengthening its credibility in the marketplace. Legislation may be an extreme measure, but it is a necessary one for survival of the independent office machine dealer.

I would be happy to answer any questions you may have.

Senator KASTEN. Thank you, and thank you for being so accurate in terms of time. You had that timed to the second.

Mr. James Ayres, who is president of the Gilson-Ayres Co. in Troy, Mich. Mr. Ayres.

Mr. AYRES. Mr. Chairman, good morning. My name is Jim Ayres, and I am president of Gilson-Ayres, Inc., in Troy, Mich.

In 1969 and again in 1970 I was president of the National Office Machine Dealers Association, and I am currently chairman of their education committee. Gilson-Ayres has been in business for 37 years. We have grown to be a rather large dealership, as dealerships go in our industry. We have about 100 employees. I carry a fairly wide range of products, including typewriters, calculators, copiers, and machines of that type. We have carried copiers for about the last 6 years.

One of the major problem areas for office machine dealers which has affected me in a serious way is the growing failure of manufacturers to provide reliable products. The nature of the office machine industry in the eighties is quite different from that of the sixties and before. The number of high tech sophisticated products now on the market is staggering. Such products require careful maintenance by skilled technicians schooled in the latest developments in microelectronics, data processing, communications, and photo reproduction.

A dealer's service personnel must continually be involved in training so as to be able to handle the changing nonstop introduction of new products and the innovations in the marketplace. In such an environment, there is an unrelenting pressure on the manufacturers to produce and quickly market a competitive product. This, coupled with the manufacturer's ability to pass all warranties on to the dealer, as well as the freedom to move to other dealers if necessary, enables one to see why the manufacturer is willing to produce a product, factory test it quickly or not at all, and market it through a dealer, who in turn is required to maintain the product at his own expense, with minimal support from the manufacturer.

As a result of such practices, office machine dealers across the country have been increasingly faced with product reliability problems, as evidenced by inadequate field testing of machines. An example is a Nebraska dealer who purchased 200 Minolta copiers, and sold them to his customers.

He was told that the Minolta had upgraded the photoconductor drum which transfers the image from the original to the copy, and since this new drum was absolutely necessary to keep the machine functional, the dealer had no choice but to purchase the part. He was charged $175 for each retrofit kit, and received no compensation for the labor and other expenses included in performing the installations.

Why did he suffer harm to his business and his reputation? Because Minolta had failed to field test the equipment properly before putting it on the market.

Changes in preventive maintenance procedures, when machines have been sold by dealers to end users. In 1981, Cannon sold a new copier, the model 200, and the specifications for this machine provided that a preventive maintenance procedure was necessary on each machine in the field every 10,000 copies. Dealers incorporated that annual cost of this requirement in each of their service contracts with their customers.

Four months later, Cannon informed the dealers that a PM or preventive maintenance procedure was actually needed every 5,000 copies. This effectively doubled the dealer's cost of service for these

machines without providing fair compensation for the service each dealer would have to perform. You can also imagine how the customers felt about that.

There have been a lot of instances of false claims by sales representatives of the manufacturers as to the product performance. Misrepresentations regarding necessary preventive maintenance, which I just mentioned, is one example. Other examples include statements by the representatives that a machine would do two-sided copying when it doesn't, and similarly, the Minolta representative assured dealers that model 310 could easily produce 6,000 or 7,000 copies a month, when it was actually found to be able to produce only 2,000 or 3,000.

These practices hurt the dealers and consumers as well. Both of the above examples illustrate the fact that manufacturers are treating the U.S. market as nothing more than a field testing ground, intent on pushing out new products as rapidly as possible. Manufacturers do not have warranty obligations to end users, and do not hesitate to force dealers to install retrofit kits on their own expense, correcting defects that should have been solved in Japan. Often a new model is nothing more than the previous model with the bugs worked out.

I am convinced that the Office Machine and Equipment Dealers' Act, S. 286, is vital to the survival of our industry, with the continued development of more expensive and sophisticated office machines, and fearful that the independent dealer will no longer be able to afford to protect consumers from the manufacturers' product deficiencies.

These companies must assume more responsibility for product failures, and certainly a customer is not best served in such an environment. Clearly, good faith standards such as that contained in S. 286 would set some very broad guidelines without unnecessarily interfering with dealer-supplier contracts.

I would be happy to answer any questions.

[The statement follows:]

STATEMENT OF JIM AYRES, PRESIDENT, GILSON-AYRES, INC.

Good morning. My name is Jim Ayres, and I am president of Gilson-Ayres, Inc. in Troy, Michigan. In 1969-70 I was president of the National Office Machine Dealers Association, and I am currently Chairman of NOMDA's Education Committee.

Gilson-Ayres has been in business for 37 years, and has grown to a large dealership with 100 employees. I carry a fairly wide range of products, including typewriters, word processing equipment, calculators, small computers, and for the past six years, copiers.

One of the major problem areas for office machine dealers which has affected me in a serious way is the evergrowing failure of manufacturers to provide reliable products. The nature of the office machine industry in the 1980's quite different from that of the 1960's and before. The number of high-tech, sophisticated products now on the market is staggering. Such products require careful maintenance by skilled technicians schooled in the latest developments in micro-electronics, data processing, communication and photo reproduction. A dealer's service personnel must continually be involved in training so as to be able to handle the rapid, virtually nonstop introduction of new products and innovations in the marketplace.

In such an environment there is unrelenting pressure on the manufacturer to produce and quickly market a competitive product. This, coupled with the manufacturer's ability to pass all warranties on to the dealer as well as the freedom to move to other dealers if necessary, enables one to see why the manufacturer is willing to produce a product, factory-test it quickly or not at all, and market it through a

dealer, who, in turn, is required to maintain the product at his own expense with minimal support from the manufacturer.

As a result of such practices, office machine dealers across the country have been increasingly faced with product reliability problems as evidenced by:

1. Inadequate field-testing of machines. For example, soon after a Nebraska dealer purchased 200 Minolta copiers (Model 101) and sold them to his customers, he was told that Minolta had upgraded the photoconductor drum, which transfers the image from the original to the copy. Since this new drum was absolutely necessary to keep the machine functional, the dealer had no choice but to purchase the part. He was charged $175 for each "retrofit kit" delivered, and received no compensation for the labor and other expenses included in performing the installations. Why did he suffer harm to his business and reputation? Because Minolta had failed to field-test the equipment properly before putting it out on the market.

2. Changes in "preventive maintenance" procedures once machines have been sold by dealers to end-users. In 1981, Canon sold a new copier (Model NP 200). The specifications for this machine provided that a preventive maintenance procedure was necessary on each machine in the field every 10,000 copies. Dealers incorporated the annual cost of such requirements in each of their service contracts with their customers. Four months later, Canon informed dealers that a "pm" was actually needed every 5,000 copies. This effectively doubled the dealer's cost of service for these machines without providing fair compensation for the service each dealer would have to perform.

3. False claims by sales representatives of the manufacturers as to product performance. The misrepresentations regarding necessary preventive maintenance which I just mentioned are just one example. Other examples include: the Canon sales rep stating the NP 200 had two-sided copying capability (it does not); and, similarly, the Minolta representative assuring dealers that the Model 310 could easily produce 6–7,000 copies per month, (end-users' experience has shown that 2–3,000 copies per month is closer to its capability).

Such practice as these hurt not only dealers but consumers as well. Dealers and end-users should not have to suffer financial loss and other damage at the hands of office machine suppliers, nor shield manufacturers from the need to produce reliable, safe products. It may seem to those not in the industry that it is bad business for a dealer to take machines without seeing or testing them. The answer lies in the manufacturer's coercive selling practices. For example, in July, 1980, at NOMDA's Annual Convention, Sharp introduced a new copier, the Model 810, which it claimed to be the state of the art. Actual models were not available; dealers were told the copier was in production and was being tested in Japan. Furthermore, Sharp stated that if orders were not placed immediately, there would be delivery problems in the future. The choice was clear: should I order machines, running the risk that, as in the past, the machines have in fact not been fully tested and have problems, or should I let my competitors buy and market them, while I am still waiting for delivery? Almost every dealer will opt to buy the machines, and the manufacturer knows it. I bought, sold and installed 119 of these machines. The 810 turned out to be a bad performer—it simply would not produce good copies. When I contacted Sharp, I was told that I was the only dealer having problems with the machine.

Imagine my surprise when Sharp then came out with a retrofit kit, designed to remedy the problem. Obviously, I was not the only one having problems—it was nationwide. The retrofit kit cost $275, and took 3 hours and 2 services calls to install and fine tune. It cost me $135 in labor, and $275 for the kit, making a total cost of repair of $410 for each machine. With 119 machines out in the field, my costs exceeded $48,000.

My costs increased, because as customers found out about the poor performance of the Model 810, they began to want out of their contracts and to return the machine. I had to buy out the leases on machines for 11 of my customers. I lost $2,000 in interest charges on each, now raising my costs to over $70,000. Additionally, the machines which I bought back, which are essentially new, must now be sold as used. Sharp, of course, does not reimburse its dealers for any of the costs involved in these situations, such as parts or labor.

This particular incident was not just an "accident" or an example of one company's poor planning. A similar problem occurred in 1981 with Savin.

In the mid-1970's Savin sold plain paper copiers through dealers. These copiers utilized a liquid tone transfer (LTT) process. Machines such as these generally produced acceptable copies, at relatively low cost, and usually with low maintenance. The LTT process had one drawback however: it was only able to produce copies on smooth surface paper. Copies could not be made on rough or rag content paper such as letterhead and bond paper.

In the late 1970's, those copier manufacturers who produced machines utilizing a "dry" toner process, developed machines with the capability to produce high quality copies on all types of paper, smooth as well as rough. Because of this development, Savin saw the need to create a copy process which could compete effectively.

At the 1981 NOMDA Convention, Savin announced the development of the "Landa" process. This was heralded by Savin to be the technological breakthrough in liquid toner copy machines that dealers needed. Savin made many claims at this time, including:

The inability of Savin's dealers to compete with the state of the art equipment of other "dry" copier manufacturers would be overcome by the Landa process;

The Landa process would produce a consistently high quality copy thus making all Savin copy machines competitive with all dry toner machines;

The Landa process would require substantially reduced preventive maintenance expense than with existing Savin copiers;

A Landa process kit could be installed on existing Savin machines in 20 minutes or less;

The Landa process allowed existing and new Savin machines to use all and any kinds of paper for copying;

A new manufacturing facility had been built to produce factory manufactured series 8000 equipment incorporating Landa which would provide even higher quality copy than available from the field-installed Landa equipment. The schedule for general availability of these copiers was July 1982; and

Copiers with the "Landa" process would be more economical to operate as they would use less toner than non-"Landa" copiers as well as having an extended drum life.

Needless to say, many dealers purchased these machines, on the basis of these representations. But dealers quickly discovered the truth. In reality this new process did not provide the Savin dealers with machines capable of competing with state of the art equipment of other copier manufacturers. Dealers found that none of the representations made were true: the Landa process did not produce consistently acceptable quality copies (thus the Savin copiers were not competitive with the dry toner copiers currently on the market); maintenance expenses were increased instead of decreased; the process kit could not be installed in a reasonably short period of time; once installed, the Landa process did not allow the use of any and all kinds of paper; those copiers with this process were less economical to operate (they used more toner than non-Landa equipped copiers and drum life was not extended); and quality of copies decreased significantly with use. Finally, despite all this, if a dealer wanted the Landa process, he often could not get it because Savin did not provide sufficient conversion kits for installation in the current copiers. The schedule for Savin's Series 8000 copiers (those equipped with the Landa process) was incorrect, as none were available in July of 1982. In fact, that equipment is still not available.

Both of the above examples illustrate the fact that manufacturers are treating the U.S. market as nothing more than a field-testing ground. Intent on pushing out new products as rapidly as possible, manufacturers avoid responsibility for defective products by passing all after-sales service requirements onto dealers. Manufacturers do not have warranty obligations to end-users and do not hesitate to force dealers to install retrofit kits at their own expense, correcting defects which should have been solved in Japan. Often, a "new" model is nothing more than the previous model with the bugs worked out. S 286 will eliminate these problems by establishing a standard of good faith to govern manfacturer treatment of dealers, thereby eliminating inadequate field testing of new equipment, delays in parts supplies, false product claims and coercive servicing requirement. Both dealers and end-users are hurt by practices such as these, and S. 286 must be passed to eliminate such abuses.

I am conviced that the Office Machine and Equipment Dealers Act (S. 286) is vital to the very survival of our industry. With the continued development of more expensive and sophisticated office machines, I am fearful that the independent dealer will no longer be able to afford to protect the consumer from the manufacturer's product deficiencies. These companies must assume more responsibility for product failure. Certainly, the customer is not best served in such an environment. Clearly, a good faith standard such as that contained in S. 286, would set some very broad guidelines without unnecessarily interfering in dealer-supplier contracts. More importantly, I firmly believe that it would be an impediment to these manufacturers' continuation of previously documented abuses. Dealers should rightfully be concerned only about sales, service and customer satisfaction.

I would be happy to answer any questions that you may have.

Senator KASTEN. Mr. Ayres, thank you very much.

The next witness is Mr. Henry Doss, Doss & Price Office Systems, Joplin, Mo. Mr. Doss.

Mr. Doss. Thank you, Mr. Chairman.

I want to thank you for the opportunity to come here and share with you this testimony. I have been in the office equipment business now for 18 years, and in that period of time I have had the opportunity to deal with several manufacturers.

I presently am the owner and president of Doss & Price Office Systems, and have been in that position for the past 3 years. We sell several products, the computer line from Wang, Xerox, copiers from Minolta and Sharp, and also typewriters from Cannon. One of the things that has been a problem for my dealership, sir, is that in these new products, as they enter into the marketplace, these manufacturers are looking for another avenue to move these products in a magnitude that would be profitable to them.

So, therefore, being aggressive in my marketplace, I have been approached by several of them of which I am presently a dealer, and one of these manufacturers had approached me, which is Panasonic, and, sir, after being their dealer for a while, during which time I actively developed the market for Panasonic, I was rewarded with a letter from Panasonic, and this letter referred to a clause in their agreement whereby I could be canceled with 45 days' written notice without cause.

Now, this letter came after they had established a much larger dealer in my market area, which had a multi-State dealership. What this did for my dealership, sir, is, it caused me to have a lot of inventory that all of a sudden was not marketable by me at the full retail value, and it also caused me to have a problem that I had hired additional staff, and that I had been advertising actively in both the newspaper, TV, the phone book, which is an item that, whenever Ma Bell gets you to put your advertisement in there, you've got to pay month to month. Regardless of whether you are still a dealer for that product, you have to pay for the ads.

So, therefore, it has cost my dealership a considerable amount of money. I agree with the two gentlemen that have testified previously this morning here to my right that the Minolta Corp. and the Sharp Corp., which I am a dealer for, have caused tremendous expense to dealers with retrofits. They bring a product to the market, and these two that have been mentioned, I was a dealer for both of these, and it cost our dealership a lot of money, and also the consumer.

Now, one of the things, Mr. Chairman, that I would like to share with you this morning is, as a young farm boy from the State of Missouri, living in the Ozarks, one of the things that we used to—a game we used to play when I was a kid in grade school was marbles. Have you ever had the opportunity to play that game, sir?

Senator KASTEN. Play marbles?

Mr. Doss. Yes, sir. Have you?

Senator KASTEN. Some people say that we do that all the time around here.

Mr. Doss. OK. One of the things, sir, that this reminds me of, this bill and our problem today, is that a couple of us boys would get together and we would bring our sack of marbles to the game,

and there were certain rules that we would both agree to, sir, and these rules were that we would draw a circle, and each one of us would put the same amount of marbles in the circle, and we had certain rules that we had to play by, and these rules were that if I shot and missed, he had the opportunity to shoot, and if you knocked the marble out of the circle, you got the marble.

Well, one of the things, sir, that I think is most important in drawing an analogy to that, to this bill that is before you today, is that there are some simple rules and regulations that are left out as we are grown boys now in a very competitive market which has a lot of growth and is growing very fast. There are certain rules and regulations that have been left out in the present bills that are law, and that is, sir, that you and I as the customer and the consumer—I am the dealer. There are three players in this game. There is a manufacturer, the dealer, and the consumer. The dealer and the consumer puts the marbles in there and pays for them, but the manufacturer, sir, does not, because he does not have a big investment in the deal like I do, so therefore, whenever the rules are changed, which is the case here with Panasonic, myself and the consumer are the two that pay the price to play the game.

Sir, I want to thank you for the opportunity of being here this morning.

[The statement follows:]

STATEMENT OF HENRY E. DOSS, PRESIDENT, DOSS & PRICE OFFICE SYSTEMS, INC.

Good morning. My name is Henry Doss, and I am President of Doss & Price Office Systems, Inc., in Joplin, Missouri. Doss & Price Office System has been in business for 3 years, and is a large enterprise with 80 employees. Our product line is rather limited, consisting primarily of copiers, computers and typewriters.

Listening to the testimony given by my fellow dealers regarding the array of problems inherent in the manufacturer-dealer relationship, I can say that most dealers in our industry have had at least one of them at some time or another. Arbitrary quotas, additional dealers set up in so-called "exclusive" territories and field-testing of products at our and our end-users' expense are all problems dealers have learned to expect as part of the price of doing business.

I would like to take this opportunity provided by the Committee to discuss some of the problems encountered by dealers entering the market. The problems dealers encounter with suppliers—misrepresentations, direct competition in the market they developed—have also become part of the customary ways of doing business in our industry and must be suffered by the small dealer if he wishes to remain in the marketplace. In some cases, the efforts put into developing name recognition and growth in sales for a supplier results in termination. The basic attitude which underlies all our problems, and the reason we are here today before this Committee, is the outright refusal of manufacturers to treat their dealers fairly and equitably.

I have had personal experience where development of a manufacturer's name and growth in sales resulted in termination. About a year and a half ago I was approached by Panasonic to become their dealer. Their recruitment story was good, and I was even promised exclusivity. I signed up and invested both money and people in this endeavor.

After being their dealer for a while, during which time I actively developed the market for Panasonic, I was rewarded with a letter from Panasonic. This letter referred to a clause in their agreement whereby I could be cancelled, with 45 days' written notice, without cause. And that is exactly what it was—for no particular reason, Panasonic cancelled me. After spending close to $45,000 in training, hiring additional people, advertising and promotion, as well as inventory, I was no longer an authorized dealer. All I have left to show for this investment is a lot of inventory which I must discount to get rid of. The reason I have all this inventory is because under Panasonic's agreement, they have "sole and absolute discretion" but "no obligation" to repurchase my inventory, even if it is new and in the original box.

There also is some question as to how I will dispose of this inventory, as there is no guarantee I can get parts and supplies from Panasonic now that I have been can-

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celled. I am therefore reluctant to sell any machine for which I cannot provide the proper service. Were S. 286 law when I entered this agreement with Panasonic, negotiations would have been on a good faith basis, and I would not be in the position I find myself, trying to preserve the reputation and good name of my company by continuing to provide service to my customer base without any parts for the Panasonic machines I have in the field.

The problems suffered by dealers of the "traditional" products such as copiers and typewriters, are also happening to those dealers in a newer market—that of computers. When computers first came onto the market forty years ago, they were tools used primarily by large bureaucracies. At that time, the computer was a machine so large and complex, only the largest corporations to consider using them. During the last two decades, however, the advances made in logic, storage and microtechnologies have created a new breed of computer. This machine is smaller, simpler, more versatile and much less expensive. As a result, electronic data processing has reached new markets—small businesses and personal use. And to reach these markets, manufacturers of computers are relying on a marketing force which has proven itself in the past—the dealer network.

Unfortunately, dealers find that they are getting caught in the middle. One finds a situation where maufacturers in this young, extremely competitive industry attempt to market highly sophisticated new equipment to end users, who oftentimes do not understand what they want or need, except that they want a computer. Suppliers are turning over equipment quickly, before further technological advances make it obsolete. Dealers find themselves marketing hardware before its reliability has been established and software which is unproven. The inevitable result is unhappy end users, who blame the dealer. Add to this the usual problems encountered by dealers: unrealistic quotas; oversaturation of the market area; and unfair contracts, and one begins to sense the frustration of a computer dealer.

In today's high tech environment, pressure on the manufacturer to produce and market a competitive product quickly is unrelenting. Couple this with the ability to pass all warranties on to the dealer and to move to other dealers if necessary, and you see how the manufacturer is essentially free and clear to produce a product, factory-test it quickly or not at all (while avoiding testing in the field under normal conditions) and market it through a dealer, who is required to maintain the product at his own expense with minimal support from the manufacturer.

As a result, computer dealers across the country have been increasingly faced with product reliability problems evidenced by inadequate field-testing of products, false product claims by sales representatives of the manufacturers as to product performance, and inability to obtain necessary parts, manuals and software. Such practices as these hurt not only dealers but consumers as well. Dealers and end-users should not have to suffer financial loss and other damage at the hands of office machine suppliers, nor shield manufacturers from the need to produce reliable, safe products.

Last year, Mr. A. G. W. Biddle, President of the Computer & Communications Industry Association (CCIA) testified before the Senate Judiciary Committee in opposition to S. 1256, the forerunner of H.R. 1159. In his testimony, he commented that when he heard the statements of the witnesses supporting S. 1256, the forerunner of S. 286, he "kept hearing the echo of the voices that for years have been saying 'let me prosper because it is my right, not because it is the just reward of my endeavors.'" Keep this statement in mind, as I relate the experience one of our members had with just one computer supplier.

Digital Equipment Corporation (DEC) approached this dealer about becoming a dealer for them. Many things were promised, but most important, this dealer was going to get DEC's newest product before anyone else. She was told that she was to be the only dealer handling DEC's products in the Santa Fe area. DEC asked this dealer to stay away from the accounts of 50 or more machines, as well as federal government accounts. Even with these restrictions, the promise of getting the latest technology seemed too good to pass up. So she signed the contract.

For eight months she waited, all the time promoting and advertising this new machine. Finally, the product arrived. However, the dealer was unable to market it because DEC began to compete with her directly, on all her accounts, and undercut her price by 20 percent. The question now is, was DEC's success in the Santa Fe area the "just reward of its endeavors"? Obviously not. DEC, like most maufacturers, moved in, took advantage of her development of the market, and prospered, not because it had earned success through hard work, but rather because it felt that due to its size and power, it had the right.

Opponents of S. 286 have the attitude that both parties are free to enter into business arrangements from which both can expect to profit. What this fails to consider

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is that dealers do not have a choice. Our suppliers are limited, and if we wish to carry the product and reach the level of growth and prosperity that both suppliers and dealers look for, we have to sign the contract presented to us, and return it unmodified.

Because so many dealers are anxious to get into the computer arena, suppliers believe they can present any agreement and a dealer will sign. I would like to take this opportunity to discuss some of the unfair provisions contained in just one agreement which is typical of those contracts computer manufacturers, currently are offering to dealers. In this agreement, the supplier specifically states that they are "only willing to enter into dealer agreements that can cancelled . . . for any reason upon . . . written notice of termination thirty days in advance." Even though a dealer is expected to pay for the training of his staff, promote and advertise the products, and provide warranty service for the products, he can be cancelled at the supplier's whim, with only 30 days' notice.

Farther on in this same agreement, the supplier states that it reserves the right ot terminate upon 30 days' notice "regardless of whether such termination is deemed to be made in good faith." It is provisions like this which demonstate the need for a law such as S. 286 which would force suppliers to act in good faith, both during the term of the agreement and upon termination.

Contracts such as the one described above are obviously contrary to the type of agreement which would allow dealers and manufacturers to develop a mutually adantageous relationship. And yet, it is this type of agreement which is presented to dealers daily, on a "take it or leave it" basis.

NOMDA has attempted to correct this situation through development of the NOMDA Model Dealer Sales Agreement. The NOMDA Model Dealer Sales Agreement is intended to be both a guideline that results in a "good faith" relationship between the manufacturer and dealer, as well as a fair, equitable and ethical agreement. The Model Dealer Agreement provides the outline of what we feel is essential in a fair manufacturer/dealer contract. The basics involved are: (1) the standard of interpretation is fair and equitable; (2) quotas are mutually agreed upon; (3) the term is open ended; and (4) provisions for an Appeal Board are included in case of disputes. Without these, it is questionable if an agreement is in the dealer's best interest. These basics afford both the manufacturer and the dealer protection. NOMDA recognizes that different segments of our industry need to build in certain reasonable protective clauses and has no objection to this. We are firm, however, in believing that dealers need protection so that they cannot be abused by their suppliers in the ways I and the other witnesses here today have described.

Unfortunately, less than 4 percent of the 400 office machine manufacturers, distributors and suppliers have adopted and are issuing the NOMDA Model Dealer Sales Agreement. Of those who have signed, all recognize and practice "good faith" and "fair, equitable and ethical" practices that are essential to the mutual relationship which should exist between manufacturers and dealers.

In view of the fact that, despite NOMDA's efforts, the number of manufacturers accepting the NOMDA Dealer Sales Agreement has fallen far short of a majority of suppliers, it is apparent that legislated dealer equality is an absolute necessity. If manufacturers are permitted continuously to force unfair dealers agreements on dealers, it may eventually lead to the demise of the independent, small business office machine dealer as a vital force in the business community.

I am convinced that the Office Machine Equipment Dealers Act, S. 286, is vital to the very survival of our industry. With the continued development of more expensive and sophisticated office machines, I am fearful that the independent dealer will no longer be able to afford to protect the consumer from the manufacturer's product deficiencies. These companies must assume more responsibility for product failure. Certainly, the customer is not best served in such an environment. Clearly, a good faith standard such as that contained in S. 286, would set some very broad guidelines without unnecessarily interfering in dealer-supplier contracts. More importantly, I firmly believe that it would be an impediment to these manufacturers' continuation of previously documented abuses. Dealers should rightfully be concerned only about sales, service and customer satisfaction.

I would be happy to answer any questions that you may have.

Senator KASTEN. Mr. Doss, thank you very much.

The next witness is Mr. Richard Nelson, who is the president of Ohio Business Machines, Inc. Mr Nelson.

Mr. NELSON. Thank you, Senator Kasten, Sentator Exon.

This is our sixth hearing for this bill, and there have been really reams of testimony on manufacturer abuses. Those are really well documented. You alluded to it in your opening statement, and you are really focusing in more today on the bill and the law, and so I would really like to stay with that.

One thing is, I have written testimonty, and when we testified at the House hearings July 21, after that, those hearings, two manufacturers, Savin and Xerox, wrote letters that were incorrect to Chairman Florio about my testimony. I have responded to those, and I would appreciate that you would read those letters, and I would appreciate in fact if you would even consider calling a forum between the three of us to find out exactly what the facts are, because we have had a lot of testimony that differs, and some of these are real simple issues, to find out what is factual and what is not factual.

I think it would be good to get that done once and for all.

Senator EXON. Mr Nelson, do you have those? I would be glad to enter that into the record.

Mr. NELSON. Yes; they are part of my written testimony.

Senator KASTEN. We will incorporate those letters as part of this testimony, immediately following your remarks here. We will have those letters inserted into the record.

Mr. NELSON. Good. I listened to the FTC this morning, again, comment on our bill, and for the life of me, it is very hard to understand their position. Recently they approved a contract for Bell Tone, the hearing aid manufacturer. The contract calls for their dealers to be restrained to a certain territory. If they go out of that territory, they are canceled. They cannot sell their product out of a specific territory.

It also states that if the Bell Tone dealer takes on any other product, he is canceled, clearly, one of the most anticompetitive contracts written in the history of office type of contracts, and they approved that, but yet they have a problem with our bill, calling it uncompetitive, and it is just difficult to understand the inconsistencies of the FTC. It is just difficult to deal with. Their concern about our 60-day clause, it is a common clause in most contracts to jibe 30 days' notice, 60 days' notice, 90 days' notice, even in something as simple as canceling an apartment, and I think that even a lot of the manufacture rental contracts for computers and copiers call for 30 days' notice, 60 days' notice, 90 days' notice. This is not an unusual request.

Last, our bill can clearly—any dealer can be canceled under our bill for just and good cause. That is a clear issue, and it does not indicate that a dealer will be a dealer, no matter what, ad infinitum. That dealer can be canceled. But in the spirit of trying to negotiate with our opposition, we have proposed to our sponsor, NOMDA has, some changes and improvements in our bill.

In the last testimony, the issue was raised that our bill may be called for once a dealer is established for a product, let us say I am established as an IBM typewriter dealer, which I am, that maybe this bill would allow me access to any product that they in fact manufacture. We have proposed this additional wording for our bill, "to furnish the dealer with agreed upon office products, and

their parts reference manuals and schematics on a timely basis." That is a No. 1 very important issue.

No. 2, our oppcsition has claimed this seemed very one-sided, that this is totally for the dealers and not for the manufacturers, therefore we have added this wording: "Any dealer who enters into a dealer agreement with a supplier shall act in good faith in negotiating the terms or provisions of the dealer agreement with the suppliers, act in good faith in performing or complying with any term or provision of the dealer agreement, and comply with the procedures set out in title 2."

Clearly, this bill is a vehicle for the manufacturer to use for bad dealers, as well as for dealers to use with bad manufacturers. So it is completely fair and equitable for both dealers and manufacturers.

Last, there has been much testimony given, and frankly, we find a lot of support in Congress for this issue, that one of the problems is, when a dealer is canceled, Senator, he no longer has access to parts and supplies. That is one of the most critical issues. And had your product liability bill been law, maybe we would not have needed some of these things, but there are other things to legislate beyond the product liability, but we have added for the parts and supply issue this clause. It is in our bill: "To provide the dealer at the then current dealer prices parts, supplies, and technical information for products sold for the longer of any existing customer agreement or five years from the date of sale of that product."

Clearly, once and for all, this will protect Wisconsin dealers, Ohio dealers, Nebraska dealers, and all dealers that they will be able to service the consumers that they sold on the product that they bought from the manufacturers in good faith. It is to me the most vital issue of this bill. We have to be able to service people who bought from us or we are all going to go out of business. So, this clause is the most important to us, and it is a new clause. I think probably staff has been apprised of this, but it is clearly a major issue for us, and I hope you will give S. 286 great consideration. Thank you, Senator.

[The statement follows:]

STATEMENT OF RICHARD P. NELSON, PRESIDENT, OHIO BUSINESS MACHINES, INC.

Good morning. My name is Richard P. Nelson, and I am president of Ohio Business Machines in Cleveland, Ohio. I am an active member of the National Office Machines Dealers Association, and volunteer my time primarily in connection with the educational seminars which NOMDA sponsors. I have been an office machine dealer for seven years. Prior to starting my own business, I worked for Apeco, one of the few domestic photocopier manufacturers, starting as a salesman and leaving as the West Coast general manager. My responsibilities as general manager included managing dealers in 13 states. In a sense, then, I can give you the perspective of both a dealer and manufacturer.

Before discussing specific examples of the problems jeopardizing our industry, I would like to underscore several points made by witnesses today. First, the manufacturer's dictatorial power over dealers is a national problem, transcending state boundaries. In my NOMDA activities, I have met over 3,000 dealers from every state in the Union. The message has always been the same—manufacturers are guilty of the same unfair practices in Ohio, New York and California. In fact, it came as no surprise to hear that dealers in Canada and England suffer from the same abuses we do in this country.

Unfortunately, we are not talking about only one or two manufacturers. Virtually all of the overseas manufacturers are guilty of the same practices. Thus, a dealer

cannot escape the tyranny of one manufacturer by going to another. Manufacturers of the most popular machines realize the control they have over dealers and are taking full advantage. It is important to realize that dealers simply do not have the tools to force the manufacturer to negotiate on a truly arms length, good faith basis. Collective action by NOMDA is, of course, illegal, and existing statutes have not been effective in scuring dealers' rights.

Opponents of the Office Machine and Equipment Dealers Act (S. 286) have made the erroneous assumption that if a dealer is unhappy with a manufacturer's treatment and attitudes such as those discussed here today, the dealer can just go to another supplier. This assumption ignores the reality of the situation, i.e., a dealer expends time, effort and money in promoting a particular manufacturer's line. The dealer leases a building, hires and trains his personnel, and spends considerable amount of money in advertising and promotion to build his customer base. With all this at stake, it should come as no surprise that a dealer is reluctant to pick up and start all over again with a new supplier.

This assumption also ignores another very important aspect of the situation—that of providing continuing service to one's customer base. Ignorance of this problem was exemplified in an editorial in the July 13, 1983 issue of the New York Times. That editorial stated that ". . . this is not a market dominated by a few, ferocious, unprincipled manufacturers. In small computers alone, 150 brands jockey for retail shelf space. An hour after a dealer were [sic] left in the lurch by Apple or I.B.M., representatives from Osborne, Epson, Digital Equipment, Sony or Xerox would be pounding on the door."

I commented on this editorial in my remarks before the House Subcommittee on Commerce, Transportation and Tourism last July. At that time, I explained that I had a contract with Xerox, which expired on June 17, 1983, but was offered to be extended through September 30, 1983. As I told the Subcommittee, should I accept the extension, I could anticipate receiving visits from Sony, Osborne and all the other computer companies on October 1st. They will all be willing to make me a dealer, and use my existing customer base. There is only one problem—they do not sell Xerox parts. And it is Xerox parts which are in the Xerox machines which I have in the field.

Shortly after that hearing before the House Subcommittee, Xerox in a letter to Representative Florio, responded to my remarks (Exhibit A). This letter stated that under the Xerox agreement, upon termination, at the dealer's request, Xerox "shall for twelve months . . . continue to sell dealer parts and standard reference manuals at the then current dealer prices." This certainly sounds good, doesn't it? However, in the letter I received, dated June 24, 1983, (Exhibit B) offering to extend my agreement to September 30, Xerox plainly states "nothing set forth in this letter shall constitute or be deemed a renewal of the subject agreement, nor shall Ohio Business Machines claim any rights to purchase Xerox products extending beyond the extension date herein set forth."

In Xerox's letter to Representative Florio, they say there are two ways a dealer can resolve his concern about servicing customers after the agreement has ended. The first is to follow the contract, buy parts and manuals for one year, and provide service himself. We have seen, however, how seriously Xerox takes this provision. The second method Xerox suggests is to sell a Xerox service agreement on equipment sold, and receive a commission. Now, commissions are nice, but as any dealer knows, it is service which makes up a large percentage of his business. Also, by agreeing to do this, a dealer would be giving up his account base to Xerox and, as the account base is a dealer's primary asset, such action would be foolhardy on the part of a dealer desiring to stay in business.

The situation with Xerox brings another important issue to light—that of term contracts. Xerox's dealer agreement is like most manufacturer's contracts, i.e., for a specific period of time. In the case of Xerox, the contract runs for two years. A vital fact the members of this Subcommittee must realize is that even though agreements will contain language stating that the duration of the contract is for a limited term, the oral agreement made at the time of entering these dealer agreements is to automatically renew the contract. It is obvious that an oral agreement is necessary, because no dealer would take on a major investment such as that involved in becoming a dealer for a particular supplier, with no assurance for the future. My investment for Xerox totalled over $180,000. Obviously, with this amount of money involved, I would have needed some assurance that the contract would be automatically renewed by mutual consent.

You may wonder why dealers do not insist on contracts with an open-ended term, i.e., no termination date. Such contracts are preferred, with dealers believing so long as they pay their bills and meet their quota, they should not have to deal with

the uncertainty every one, two or three years which is inherent in term contracts. In fact, the NOMDA Model Dealer Agreement, a sample contract encouraged by the Association, contains such an open-ended provision. Unfortunately, of the over 400 manufacturers/suppliers in the industry, only 30 have agreed to offer this agreement to their dealers.

Xerox, needless to say, is not one of these 30 companies. They followed the letter of their contract, and I was terminated as a dealer according to my contract, when the term expired June 17, 1983. In my letter to Representative Florio (Exhibit C), wherein I respond to Xerox's letter, I describe the confusion surrounding this nonrenewal. The problems I now face, ranging from servicing machines in the field, to whether or not Xerox will repurchase my inventory, would be alleviated were S. 286 law. Dealers such as myself need S. 286 to provide the requirement that manufacturers such as Xerox treat their dealers on a good faith basis, and avoid problems such as these I have described.

Another one of the most important issues facing dealers today is sales quotas unilaterally and arbitrarily imposed by manufacturers. Quotas are important in that they give rise to advertising allowances and other sales incentives, and are used by manufacturers to determine placement of new dealers and the termination or nonrenewal of existing dealers. As yet, manufacturers have had no incentive to provide realistic quotas. From their standpoint, it is far preferable to continue using quotas as swords dangling over dealers' heads rather than as dealer goals, since it is a highly useful tool in the control of dealers. Manufacturers believe they can, in good conscience, terminate a dealer who doesn't meet quotas no matter how artificial his quota may have been.

The standards manufacturers currently use in setting quotas for dealers have no basis in reality. For example, in 1980, Sharp had a quota of 83,000 copiers for the U.S. market. In actual fact, only 41,000 copiers were exported to the U.S.—less than 50 percent of the quota. This was not a mistake. As a member of the Sharp Dealers Advisory Council, I had the opportunity to meet with Sharp's top management. At one such meeting, I was astonished to hear the president, Mr. Sagawa, congratulate the national sales manager for having a "good year" and being over quota. When I raised the obvious disparity between the in-house quota and that given to dealers, the response was that maybe the dealers' quotas were too high, but that would be taken care of next year. Just to show how much good faith Sharp demonstrates, the quota for 1981 was reduced to 82,300 copiers, a far cry from the 83,000 quota in 1980! Moreover, the president informed us that he expected that 55,000 would be the absolute maximum number of copiers imported into the U.S. in 1981.

The gross total of machines that Sharp uses to base its allocations (40,000 units per year, 80,000 units per year, etc.) has always been determined by Sharp, and dealers have had absolutely no approval or refusal rights. Sharp sets quota on individual machine units based on what they want to manufacture, and dealers are assigned specific quotas by model. Dealers have no say in this system. In fact, a dealer can be required by Sharp to sell 200 units in a year, but if the model mix of the dealer's performance is not in agreement with Sharp's model mix, he would be considered under quota. S. 286 will balance this situation by mandating that manufacturers and dealers act in good faith in performing or complying with any terms or provisions of a dealer agreement, such as quota determination.

Because no law currently exists to prohibit the setting of arbitrary and unethical quota allocations, dealers have approached manufacturers such as Sharp in various ways with alternate quota determination systems. One route used by dealers to attempt to negotiate with their suppliers is through establishment of a Dealer Advisory Council. Out of the more than 400 suppliers in the industry, only 20 have agreed to the establishment of such a program. The Sharp Dealer Advisory Council, as all Councils, exists to serve as a forum for the honest and sincere exchange of ideas between dealers and Sharp, and works to open a "line of communication between Sharp and the Sharp copier network." The Council suggested that Sharp use a county-by-county distribution across the United States as a more equitable method of setting quotas. The net effort of this method would be that if the business buying power statistics indicated that a particular county accounted for 1 percent of the United States buying power, it would be assigned only 1 percent of Sharp's total quota; not 2 percent of 3 percent because the dealer was doing well. In the past, manufacturers have over-loaded an area with quota because of a dealer's excellent performance.

For years, dealers have urged Sharp to go on a dollar volume quota, but these requests also have been denied. Instead, dealers find they are assigned quotas for machines before the machines are available. Even if a dealer was able to sell his assigned quota, he would not be able to get all the machines he needs. This results

in many dealers in the country being "under quota" from the start of their agreement. As a result, Sharp will usually add another dealer to the area, since the first dealer is not making his quota. Thus, Sharp and other manufacturers use the lack of machine availability to manipulate existing dealers and to add new dealers to already existing markets.

Not long ago, in the presence of the Sharp ombudsman, Robert Woletz, I suggested to Mr. Castrianni, the Vice-President of the Sharp Copier Products Division, that Sharp eliminate the word "quota" and announce Dealers Machine Goals. Then at the end of the fiscal year, Sharp would total what had actually been sold and delivered in the United States, and that would be the quota figures that Sharp dealers would be measured against. This, of course, would be completely fair because we would be dealing with actual dealer numbers against actual manufacturer numbers. At first, Mr. Castrianni agreed but later refused to put it in writing, saying that it was not feasible.

After I gave testimony before the Senate Commerce Committee in October of 1981 describing these problems involved with sales quotas, Sharp sent a letter to Senator Pressler, the president of NOMDA, Mr. Merlin Jeitz, and myself, attempting to refute Mr. Jeitz's and my testimony. In this letter, Mr. Castrianni pointed out that "the quotas Sharp assigns to its dealers are based on a statistical formula for estimating production sales in the dealers' geographical area which we developed with the advice and approval of the Sharp Dealers' Advisory Council of which Mr. Nelson is a member." (I was improperly terminated as Chairman of this Advisory Council after testifying before the Senate Commerce Committee in October of 1981.) In addition, Sharp stated in this letter that quotas are only used for the measurement of sales performance for the mutual benefit of Sharp and its dealers. Since December 2, 1981, it is a fact that Sharp has put over 40 dealers on probation, and cancelled at least 15 dealers as a result of failure to reach quota. I sincerely doubt that all these dealers feel that Sharp's quotas are to their "mutual benefit."

The Office Machine and Equipment Dealers Act, S. 286, establishes a standard of good faith to govern manufacturer treatment of dealers, helping dealers bargain more effectively, and leading to negotiated contracts and mutually agreed upon sales quotas. The Bill, if law, would ensure that quotas are fair and reasonable, arrived at only after consultation with dealers. No longer would quotas be so unreasonably high that no dealer could meet them. Manufacturers would be prohibited from arbitrarily establishing absurd quotas for the purpose of keeping dealers in line. Quotas would become realistic goals—high enough to satisfy the manufacturer's need to encourage market penetration, yet low enough to enable the dealer to reach them with reasonable effort—and in all cases mutually agreed upon.

The inequitable placement of new dealers is another serious problem in our industry. Most dealers do not have exclusivity within their sales territories, and dealers, who not only accept but thrive on competition, have no expectations regarding exclusivity. Nevertheless, office machine manufacturers customarily assure new dealers that they will take no action to infringe on their new sales areas. The dealer subsequently expends considerable time, money and effort to promote the name of his supplier and build end-user acceptance and demand for its products. The dealer does so with the expectation that he will be able to take advantage of his success in building product goodwill through increase profitability and growth. The dealer seeks to expand and maintain customer satisfaction as his market and sales grow.

Unfortunately, office machine manufacturers often prefer to set up new dealers where existing dealers have had success. In many cases, the supplier chooses not to market through a dealer at all but to set up a wholly owned operation in a successful dealer's market area. The wholly owned branch operation obviously has a significant competitive advantage over the existing dealer whose profitability is severely impaired. Often the heretofore successful dealer is driven out of business. For example, it is a fact that in virtually every major urban area in the United States, Sharp has multiple dealers and in many major cities, they have three, four or more authorized dealers.

While manufacturers generally do not grant territorial exclusivity, their pitch to new dealers is replete with verbal assurances of "no interference" with his markets. It is important for a dealer to know that his hard work and investment in building a market will be rewarded and that the frutis of his efforts will not be stolen. When I started in business as a dealer, I was promised by a Sharp Vice-President that I would be left alone to develop my market. Sharp did not hesitate to subsequently appoint a new dealer 15 miles from me, and I did not object. However, two days later, that new dealer opened a branch virtually next door to me. In doing so he was able, without cost, to take advantage of all the heavy advertising for Sharp I had undertaken and all the goodwill I had generated.

Who is the loser when manufacturers saturate a market with dealers? Certainly not the manufacturer. It is the dealer and the consumers who are hurt because dealers must cut profit margins to unreasonable levels and even scale back service. As you know, the key to any office machine is service and supplies, which, over the life of the machine, cost more than the initial price of the unit. So, in the end, it is the consumer who suffers.

Yet, when the manufacturer has wholly owned sales branches which compete with independent dealers, they sing a different tune. In 1981 I testified as an expert witness in a trial in Oregon state court in a suit brought by a prospective dealer against Canon. The prospective dealer had decided to take on the Canon line, been given an oral contract, and sent his employees to Canon's service school. However, when Canon discovered that the dealer had a branch in Los Angeles which could compete with Canon's wholly owned sales branch, he was cancelled. S. 286 prohibits a manufacturer from utilizing fraud in entering a dealer agreement, a prohibition which would have saved this Oregon dealer considerable expense and loss.

Dealers also are beginning to find themselves in competition with retail distributors. In October of 1981, Olivetti began to market typewriters through Sears, the well-known retail giant. The Olivetti Dealer Advisory council was not forewarned of the new Sears marketing program. This is yet another example of a major office machine manufacturer setting up a marketing operation in an area where existing dealers have created the name recognition and goodwill necessary for successful sales growth. A company such as Sears also has an obvious advantage over the small independent dealer. Because of its size and available capital, Sears is in a much better position than the independent dealer to negotiate a fair and equitable contract. Furthermore, Sears has the unique option of private labeling the product it chooses to market based on a well-known name and reputation, an option not open to the independent dealer.

Another example of how manufacturers bend the rules they themselves have established is the implicit sanction they give to unauthorized dealers, those dealers who do not have even an oral dealership agreement.

In 1980, Los Angeles, California, there was one authorized Sharp dealer, but many Sharp machines were sold by unauthorized Sharp dealers. These dealers were providing inadequate service because their unauthorized relationship did not allow them to buy parts or receive factory service training. Through a quirk in California law, the abused consumer could sue not only the unauthorized dealership that sold the equipment, but the manufacturer of the equipment as well.

Donald Mossman, General Counsel for Sharp Electronics Corporation, phoned the Los Angeles dealer and told him about Sharp's problem with these lawsuits. The dealer announced to Mr. Mossman that his company's policy was only to service those machines sold by his company. Mr. Mossman told the dealer that he appreciated this policy, but that Sharp was in a real bind and could not continue to stand the risk of lawsuits. Mr. Mossman further stated that if the dealer continued to refuse to service anybody with a Sharp machine who wanted service, Sharp would be forced to open up a copier branch in Los Angeles. Since I first told this story before the Senate Commerce Committee in October, of 1981, additional Sharp authorized dealerships have been established in the Los Angeles area. At this time, at least six authorized dealerships, and a myriad of unauthorized dealerships exist.

Finally, I would like to reiterate that current laws simply do not afford office machine dealers a reasonable remedy for the unfair and inequitable treatment we continually receive. The antitrust laws as they have been historically interpreted, and even basic contract law are of no help. In the several situations I have considered suing a manufacturer, my attorney has advised me that such action would be futile. In fact, after my cancellation by Savin, I spent over $10,000 on legal research only to be told that I didn't have a case. The Oregon lawsuit against Canon I previously mentioned is another good example. That case resulted in a directed verdict for the defendant solely on the grounds that the Oregon Statute of Frauds barred suit on an oral contract. The judge reluctantly refused to let the case go to the jury, and in open court criticized the defendant for undertaking such inequitable actions. The case was tried only on the contract issued because the plaintiff's lawyers informed him that antitrust grounds were simply not available.

The case of my termination by Savin is another useful example. I was terminated for failure to meet sales quotas, even though the largest impediment to improving Savin sales was Savin itself. I was Savin's service agent for their government sales, which they handled directly, and was therefore obligated to spend large sums for parts and other servicing requirements for which partial reimbursement was due from Savin. Even though they owed me thousands of dollars due to their consistent 3 to 12 months arrearages in payment, they would not continue to provide parts to

meet service obligations for existing customers, causing me further expense and hardship. Needless to say, Savin has still refused to buy back my inventory or offer any compensation for the goodwill I have generated. It is interesting to note that very soon after my termination, Savin established a wholly-owned branch operation in my area.

I discussed this problem concerning Savin in my testimony before the House Subcommittee. Savin responded with a letter to Representative Florio (Exhibit D) wherein they claim I owe Savin $43,000, and have failed to return $19,000 worth of machines. I have attached a copy of my letter to Representative Florio (Exhibit E), which contains copies of correspondence from Savin, agreeing to settle all outstanding disputes for $20,703. Despite this agreement, Savin has refused to pay, and the matter is now in litigation. This is just another example of the unfair treatment dealers must suffer at the hands of their suppliers.

S. 286 is necessary for dealers survival. Passage of this Bill would provide the dealer with a remedy in federal court for disputes arising out of the dealership agreement. It also will provide the dealer with specific rights designed to equalize his relationship with his powerful overseas suppliers. Finally, perhaps most important, the Office Machine and Equipment Dealers Act will act as a significant impediment to continued unfair dealings by manufacturers, such as unrealistic quotas and oversaturation of the market.

I would be happy to answer any questions that you may have.

Attachments.

EXHIBIT A

XEROX,
Washington, D.C., August 9, 1983.

Re H.R. 1159—Testimony—July 21, 1983.

Hon. JAMES J. FLORIO,
Chairman, Subcommittee on Commerce, Transportation and Tourism, House of Representatives, Washington, D.C.

DEAR MR. FLORIO: In hearings held July 21, 1983 on H.R. 1159 (The Office Machine and Equipment Dealers Act), Mr. Richard P. Nelson, President, Ohio Business Machines, Inc., of Cleveland, Ohio, testified about his contractual relationships as a dealer for Xerox Corporation's Office Products Division. The purpose of this letter is to provide you with some additional facts regarding that contractual relationship not brought out at the hearing and we would respectfully request that this letter be appended to the hearing testimony of that day, immediately following Mr. Nelson's testimony.

Ohio Business Machines, Inc. was one of the first dealers signed by Xerox Office Products Division. The terms of the agreement limited the contract to an initial period of two years without renewal. The Xerox agreement clearly stated: "Xerox desires to determine if its line of quality word processing and facsimile transceiver equipment (herinafter the "products") can be effectively sold to small businesses through authorized dealers. Dealer desires to assist Xerox for a period of two years in measuring the effectiveness of distributing the products through an authorized dealershp." Accordingly, both Xerox and the dealer were clearly aware from the outset of the contract that the business relationship was limited to two (2) years.

The contract with Ohio Business Machines expired June 17, 1983. On June 24, 1983, Xerox offered to extend the agreement through September 30, 1983. In the letter offering an extension, it stated: "All terms and conditions of the subject agreement shall remain in full force and effect during the extension period." Mr. Nelson in his testimony indicated that at the expiration of the extension period, he would be unable to get parts to service customers with whom he has service contracts. The basic agreement, which is still in full force, provides "Xerox, upon dealer's request, shall for twelve months after the termination of this agreement continue to sell dealer parts and standard reference manuals at the then current dealer prices." It should also be pointed out that Mr. Nelson is currently a dealer and has not been terminated.

Mr. Nelson, in his testimony, was most concerned with the servicing of customers after the sale during the dealership agreement. There are two ways of handling this service. First, the dealer can buy parts wholesale and provide service itself. Second, the dealer has the option of selling Xerox equipment with a manufacturer's warranty that passes through to the end user and, in addition, selling a Xerox service agreement on the equipment for an additional commission. In other words, Mr. Nelson could have avoided any worries about service in the event of a termination

through provisions already contained in the contract. It should also be noted that in the event of termination, Xerox Corporation, at the dealer's request, will repurchase up to predetermined levels the products, related supplies, and replacement parts in the dealer's inventory at the prices the dealer paid to Xerox for those items.

Xerox would like to reiterate its opposition to H.R. 1159. There can be, from time to time, legitimate disagreements between two parties in a dealership arrangement. The Uniform Commercial Code and existing state and federal statutes adequately cover all parties concerned in such disputes. H.R. 1159, in addition, singles out a highly competitive industry with a large number of U.S.-based manufacturers for restrictive legislation. Finally, it would increase the costs of doing business, which ultimately increases the cost of office equipment to dealers and to the consumer.

Thank you for the opportunity to include this in the hearing record. If you should have any questions of Xerox, please feel free to contact me at 554-1771.

Very truly yours,

ROBERT H. SCHEERSCHMIDT,
Director, Federal and State Government Affairs.

EXHIBIT B

XEROX CORP.,
Dallas, Tex., June 24, 1983.

RICHARD NELSON,
Ohio Business Machines,
Cleveland, Ohio.

DEAR MR. NELSON: We have noted that the Dealership Agreement and extension between Xerox Corporation and Ohio Business Machines, dated June 17, 1981, expired on June 17, 1983. We are presently reviewing a number of aspects of our reseller program, which has required significant manpower efforts. Nevertheless, we do wish to offer you the opportunity to extend the subject agreement through and including September 30, 1983. Should you desire to do so, please indicate your acceptance of the terms and conditions set forth in this letter by executing the enclosed copy of the same and returning it to my attention.

1. Xerox Corporation and Ohio Business Machines agree that it is in their mutual best interests to extend the term of the above-noted agreement through and including September 30, 1983.

2. All terms and conditions of the subject agreement shall remain in full force and effect during the extension period.

3. The extension of the subject agreement is without prejudice to Xerox' rights set forth in the subject agreement. However, nothing set forth in this letter shall constitute or be deemed a renewal of the subject agreement, nor shall Ohio Business Machines claim any rights to purchase Xerox products extending beyond the extension date herein set forth. Except as herein expressly set forth, the subject agreement shall remain in full force and effect during such extension period.

As a valued member of the Xerox reseller team, we make this offer in the hopes that you will execute this extension. The question of contract renewal will be decided prior to September 30, 1983. We look forward to your continued participation as a Xerox reseller.

Sincerely,

DAVID M. HECK.

EXHIBIT C

OHIO BUSINESS MACHINES, INC.,
Cleveland, Ohio, August 30, 1983.

Hon. JAMES J. FLORIO,
Chairman, Subcommittee on Commerce, Transportation and Tourism, Committee on Energy and Commerce, House Office Building, Washington, D.C.

DEAR CHAIRMAN FLORIO: I am writing in response to the letter you received August 9. 1983, from Robert H. Scheerschmidt, Director, Federal and State Government Affairs, Xerox Corporation. As emphatically and unequivocably as humanly possible, the contract relationship that Xerox proposed to me in June of 1981, as well as two other dealers, was on a standard renewal basis. Even though the contract language states that it is a two year contract, that is a common occurrence in the office equipment industry. Manufacturer's contracts, including the Xerox 820 contract, are clearly contracts of adhesion on a take it or leave it basis.

When we met with Xerox personnel, including our original contact of Christine Morris our representative, Austin Stanford, the Division General Manager, David

Lynn, as well as the President of Xerox's Office Products Group, it was always clearly stated that this would be a standard renewal contract and at the end of two years, the contract would be renewed by mutual consent. No dealer, under any circumstances, would take on a major investment with any manufacturer knowing that there was no hope for the future for parts, supplies, service revenue and on-going product. Manufacturers historically offer a written contract with a verbal follow-up to the dealer.

My company made an initial investment with Xerox of over $100,000 for equipment, parts and supplies, and we made additionally over an $80,000 initial investment in personnel and facilities to set up this brand new division. This investment was solely made because I "bought the Xerox story" and relied on their representation to me of a future contract beyond the initial term agreement. Never was this contract or the relationship represented as limited to two years . . . this was always going to be an on-going, lifetime arrangement. Xerox's representations to the contrary today are completely and totally inaccurate.

Xerox goes on to say that thet sent me a letter on June 24 offering to extend my agreement through September 30, 1983, after my original contract date terminated on June 17, 1983. It is this same June 24 letter that I enclose as a copy for you and it's from this letter that I read certain sentences into the Congressional Record at our July 21 hearings. Xerox includes one sentence that is correct, "all terms and conditions of the subject agreement shall remain in full force and effect during the extension period". Again, that is true, but obviously an extension of a couple of months is completely pointless to my customers to whom I will be unable to provide service beyond September 30, 1983, according to this letter. What Xerox left out was a further sentence, "However, nothing set forth in this letter shall constitute or be deemed a renewal of this subject agreement, nor shall Ohio Business Machines claim any rights to purchase Xerox products extending beyond the extension date herein set forth." This is the sentence I read into the record July 21, and this of course, is the sentence that has caused me, as well as many dealers, and additionally many members of Congress, to be very concerned about how will a dealer service his account base if the manufacturer refuses to sell him product to support the machines the dealer purchased in good faith.

Xerox goes on to state that I am a dealer of theirs, and that is emphatically untrue. I was terminated on June 17, 1983. As you will see, the letter they sent me June 24 offering an extension had to be signed by me. I did not sign this extension . . . therefore I am terminated. Why did I not sign the extension? Simply because of the language, "The extension of the subject agreement is without prejudice to Xerox's rights set forth in the subject agreement," "except as herein expressly set forth, the subject agreement shall remain in full force and in effect during such extension period . . . I give up my rights by signing this agreement and I feel that I should have an opportunity to express my rights due to Xerox's mishandling of this program.

I have enclosed numerous articles [1] that make reference to Xerox's problems with the 820 program, including one from Tuesday, August 30, as well as one by the President of the Division, clearly stating, "with the 820 we did not do a good job". There is no doubt that Xerox would want me to sign off on my rights, but I don't choose to do that, though it is a tremendous catch-22 for me as a dealer and my customers.

Xerox also stated that the dealer has the ability to sell equipment with a manufacturer's warranty, as well as selling a Xerox service agreement and getting an additional commission. First and foremost, dealers make money as do manufacturers on the servicing of equipment, so it's rather difficult to be in business and give up your livelihood. Additionally, to do what Xerox suggests would mean the dealer would have to give up his account base to Xerox and that would be completely foolish, as an account base is a dealer's primary asset.

Lastly, what Xerox suggests cannot be done after the dealer is terminated, so it's somewhat of a moot point. Xerox clearly states, "In other words, Mr. Nelson could have avoided any worries about service in the event of a termination through provisions already contained in the contract.". . . as of June 17, I am no longer a dealer, and therefore, the contract provisions that Xerox suggests apply to me, do not . . . they only apply to contracted dealers. It is true that for one year after my termination, I am able to buy parts and supplies from Xerox at dealer cost, but this is a wholly unsatisfactory remedy, as to compete with Xerox I must offer a 7-year guarantee on my product, and much of my equipment is on 5-year lease/purchase finance arrangements. So, even though Xerox will offer me a year to purchase parts

[1] The articles are in the Committee files.

BEST COPY AVAILABLE

and supplies, the remaining 60-90 percent of the useful life of the product will not be able to be maintained by me because of this Xerox policy. The end result will be that my customers will sue me for noncompliance and whether my business will be able to withstand this devastating blow, I can only speculate on today.

It is interesting to note that Xerox closes that paragraph with this sentence, "It should also be noted that in the event of termination, Xerox Corporation, at the dealer's resquest, will purchase up to predetermined levels, the product's related supplies and replacement parts in the dealer's inventory at the prices the dealer paid to Xerox for those items.". . . here is the exact wording from the contract, "Xerox, upon dealer's request, shall repurchase all products, related supplies and replacement parts in dealer's inventory at the prices dealer paid Xerox for such items, provided such products have not been installed by dealer at its customers' premises or placed into use or demonstrated by dealer, and such supplies and replacement parts are returned unused in their factory sealed containers." It may be my good fortune that Xerox's letter to you, Chairman Florio, of August 9, 1983 is in fact a contractural offer to repurchase under the terms of this letter, which certainly greatly alter the terms of the contract that I originally signed. If in fact this August 9 letter supersedes the contract, Xerox is apparently offering to repurchase all of my inventory, regardless of condition, as well as my supplies and parts, whether or not they are in factory sealed cartons or lying open in the storage bin.

So often in this world of big manufacturer and small dealer you see examples like this where the manufacturer is allowed to interpret their contract of adhesion in a very "willy-nilly" fashion. Yet the dealer is bound to adhere to the strictest of language without interpretation. Well I am sincerely hopeful that Xerox's letter to you will be construed as a contractural offer to me because it would greatly help in the financial burden.

Lastly, Xerox makes reference to the Uniform Commercial Code. NOMDA's feeling is clear on this subject, but we have not yet been able to clearly gain agreement in Congress on our position. The UCC is primarily directed toward consumers, not intermediaries (dealers) in the distribution process. H.R. 1159 offers the same relief sought by and granted to, by Congress, the highly competitive auto and soft drink industries. Every manufacturer would have to live by the rules so there would be no competitive advantage or disadvantage.

Very truly yours,

RICHARD P. NELSON.

EXHIBIT D

SAVIN CORP.,
Valhalla, N.Y., July 28, 1983.

Hon. JAMES J. FLORIO,
Chairman, Subcommittee on Commerce, Transportation and Tourism, Committee on Energy and Commerce, Rayburn House Office Building, Washington, D.C.

DEAR CHAIRMAN FLORIO: Enclosed are the comments of Savin Corporation in opposition to H.R. 1159—the "Office Machine and Equipment Dealers' Act." It is my hope that these comments can be made a part of the record of the proceedings on this bill before your Subcommittee.

It is my understanding that at the July 21, 1983 hearing before your Subcommittee, Richard Nelson, President of Ohio Business Machines, testified that Savin terminated a relationship with his business without prior notification. I understand that he also claimed that Savin owed "thousands" of dollars to him.

I would like to set the record straight on this matter. According to our records, Mr. Nelson was notified of the problems Savin had with his dealership nearly eight months prior to the termination. During this time, Savin attempted to resolve these problems. Unfortunately, these efforts were not successful. With regard to the question of money owed to Mr. Nelson, our records indicate that Ohio Business Machines failed to pay Savin approximately $43,000 for goods sold and delivered. In addition, Ohio Business Machines failed to return over $19,000 of machines in their possession owned by Savin.

I appreciate the opportunity to present these views to you and the Subcommittee. I will be happy to provide further information to you or other Subcommittee members upon your request.

Thank you for your consideration of these comments.

Sincerely yours,

RICHARD GRALTON.

Enclosure.

EXHIBIT E

OHIO BUSINESS MACHINES, INC.,
Cleveland, Ohio, August 30, 1983.

Hon. JAMES J. FLORIO,
Chairman, Subcommittee on Commerce, Transportation and Tourism, Committee on Energy and Commerce, House Office Building, Washington, D.C.

DEAR CHAIRMAN FLORIO: I am writing to provide additional information pertaining to the matters discussed in the letter of Richard T. Gralton, President of Savin Corporation, directed to you on July 28, 1983. My July 21, 1983 testimony to your Committee, that was comprised of both oral and written testimony, was and is correct in all respects. I clearly state in my testimony that I was terminated for failure to meet sales quotas, though much testimony has been given to the fact that there is a major problem with the control of dealers, vis-a-vis, manufacturers, inflated sales quotas.

Savin Corporation owes Ohio Business Machines, Inc., $20,703, based on an agreement resolving all outstanding disputes (correspondence enclosed). Savin has repudiated the agreement and the entire matter is now in litigation. For you and your staffs' perusal I have included a copy of the complaint which clearly lists the scenario. I cannot think of a better example of a manufacturer's cavalier behavior than this one. Here we clearly have Savin's General Counsel making an offer to Ohio Business Machines and Ohio Business Machines clearly accepts. This was after many months of negotiations and it looks like the most black and white, clear cut issue of all time. We don't know why Savin has chosen to behave as they have, but we have chosen to include punitive damages in our plea because it's extremely difficult for a small business person in America today to stand up against a company the size of Savin, or Savin's parent, Canadian Development Corporation, a multibillion dollar, multinational, company. As you can guess, I thought I had my problems resolved, and now I have my attorney's meter running, and Savin, of course, is fully cognizant of these facts.

To add insult to injury, my attorney is my chief witness, as he was the primary negotiator with Savin's General Counsel. And because of that fact, legal canons require me to not utilize him as my attorney, and in fact, I've had to hire additional legal representation and spend considerable funds getting them up to speed to accomplish what apparently was already accomplished. * * * Savin's offer to settle it's debt with Ohio Business Machines, Inc. Savin agreed to pay me the $20,703. * * * all credits and debits were clearly considered in that settlement offer and testimony will be exhaustive on that subject.

These letters, my pleadings, and Mr. Gralton's letter are as perfect an example as I could possibly show you as to why Richard Nelson and many concerned dealers from the National Office Machine Dealers Association strongly urge your support of HR 1159, and pray for its markup in early September.

Very truly yours,

RICHARD P. NELSON.

Enclosures.

IN THE COURT OF COMMON PLEAS, CUYAHOGA COUNTY, OHIO

OHIO BUSINESS MACHINES, INC., PLAINTIFF,

v.

SAVIN CORPORATION, STATUTORY AGENT FOR SERVICE OF PROCESS: PRENTICE HALL CORP. SYSTEM, INC., DEFENDANT

CASTAMOS J. SWEENEY, *Judge*

Complaint (Jury Demand Endorsed Hereon)

COUNT I

1. Plaintiff is a corporation duly organized under the laws of the State of Ohio. Plaintiff sells and leases copiers, supplies and related services. Plaintiff is informed and believes that defendant is a corporation duly organized under the laws of the State of Delaware, which is and has been, at all times relevent hereto, transacting business in Ohio.

2. From about 1978 to 1980, plaintiff was a dealer for defendant in the Cleveland area, pursuant to an agreement between the parties. Defendant terminated plaintiff as a dealer in August, 1980, although thereafter plaintiff continued to maintain and service numerous Savin accounts under conract with plaintiff.

3. In November, 1980, negotiations commenced between plaintiff and defendant, whereby defendant offered to repurchase from plaintiff Savin copiers, machine parts and other equipment inventories still possessed by plaintiff. At the request of defendant, plaintiff expended substaintial amounts of labor and money performing maintenance on the inventory, in reliance upon defendant's representation that it would thereafter repurchase such inventory from plaintiff.

4. While continuing to negotiate with plaintiff over defendant's repurchase of the various items described above, defendant commenced a program of inducing plaintiff's Savin Customers to terminate their service and maintenance agreements with plaintiff and to enter into similar agreements with defendant's newly established branch office and another Savin dealer in the Cleveland area.

5. In 1982, defendant appointed as its new dealer in the Cleveland area HPS Office Systems, Inc. (HPS). HPS and plaintiff commenced negotiations for purchase by HPS of plaintiff's remaining Savin accounts and personal property used in connection with servicing such accounts. Defendant was informed by plaintiff that final agreement between plaintiff and HPS was contingent upon defendant's repurchase of plaintiff's existing inventory of Savin copiers and related equipment and defendant's existing inventory of Savin copiers and related equipment and defendant's release of all claims against plaintiff, including but not limited to any amounts owed on plaintiff's former account with defendant.

6. By letter dated March 26, 1982, defendant offered to pay plaintiff the sum of $20,703 in full settlement and release of all claims between plaintiff and defendant, provided that plaintiff return to defendant various compers in the possession of plaintiff. A copy of defendant's letter is attached hereto as Exhibit A. Plaintiff accepted defendant's offer. A copy of plaintiff's letter confirming its acceptance is attached hereto as Exhibit B.

7. In reliance on defendant's offer, plaintiff entered into and performed a final agreement with HPS which was closed on March 31, 1982. In entering into this agreement and selling plaintiff's remaining Savin accounts and related personal property to HPS, plaintiff materially relied upon and was induced by defendant's prior written offer of March 26, 1982.

8. Following plaintiff's acceptane of defendant's offer of March 26 and plaintiff's sale of its remaining Savin accounts to HPS, defendant willfully and maliciously attempted to repudiate its prior offer.

9. Having obtained the account base for its dealer, defendant then willfully and maliciously breached its contract with plaintiff and refused to perform its obligations to pay plaintiff $20,703 and to release plaintiff from any and all claims held by defendant.

10. Plaintiff has performed all of its obligations under its agreement with defendant. However, defendant has willfully and maliciously breached the agreement, thereby damaging plaintiff in the amount of $20,703 and further depriving plaintiff of the benefits of the promised release of all claims held by defendant against plaintiff, including but not limited to defendant's obligation to release plaintiff of all claims on any past account.

11. Due to defendant's misconduct, plaintiff has been irreparably harmed and has no adequate remedy at law.

COUNT II

12. Plaintiff incorporates herein by reference each and every allegation set forth in the preceding paragraphs of this Complaint.

13. Due to its letter offer attached to this Complaint as Exhibit A and its representations during numcrous telephone communications between defendant and plaintiff, defendant should have reasonably expected its offer to induce plaintiff to enter into and perform its agreement to sell plaintiff's Savin account base to HPS, contingent upon defendant paying plaintiff $20,703 for the repurchase of inventory and releasing plaintiff from all claims, as has been expressly stated by plaintiff to defendant prior to consumation of that agreement.

14. Defendant's written and telephonic communication of its offer did in fact induce such reasonable action on the part of plaintiff, after which defendant attempted to repudiate its contract with plaintiff and defendant's obligations thereunder.

15. Under these circumstances, defendant is estopped from now repudiating and failing to perform its promises to plaintiff.

16. Under equitable principles and the doctrine of promissory estoppel, defendant is now obligated to perform its prior promises to plaintiff.

COUNT III

17. Plaintiff incorporates herein by reference each of the allegations set forth in the preceding paragraphs of this Complaint.

18. Plaintiff states that defendant fraudulently induced plaintiff to sell its remaining Savin account base to HPS, for the purpose of obtaining for HPS plaintiff's established Savin account base.

19. In order to accomplish its purpose, defendant falsely represented and promised to plaintiff that defendant would repurchase from plaintiff Savin copiers, machine parts and equipment inventory still possessed by plaintiff, pay plaintiff the sum of $20,703, and release plaintiff of all claims held by defendant against plaintiff, if plaintiff would agree to release all claims against Savin and enter into and perform an agreement with HPS, whereby plaintiff would sell its existing Savin account base to HPS.

20. At the time defendant made such representations and promises to plaintiff, in writing and orally, defendant knew such representations and promises were false on its part and defendant fully intended to mislead and induce plaintiff to rely upon such promises and representations.

21. In fact, plaintiff did rely in good faith upon such promises and representations by defendant, resulting in plaintiff's injuries and damages described in the preceding Counts, as a consequence of such reliance.

22. Plaintiff has been damaged due to the fraud and bad faith exhibited by defendant, all as described above.

23. This Court has jurisdiction over defendant and the claims set forth in all Counts, as they arose out of defendant's (1) transaction of business in Ohio; and (2) defendant's causing tortious injury to plaintiff by acts or omissions occurring both in and outside Ohio, where, defendant regularly does and solicits business in Ohio, engages in persistent conduct in Ohio, and derives substantial revenue from goods used and services rendered in Ohio.

Wherefore, plaintiff demands judgment against defendant as follows:

(a) An order of specific performance requiring defendant to immediately perform its obligations to plaintiff under their agreement, including defendant's payment to plaintiff of $20,703 and defendant's execution and delivery to plaintiff of a release of all claims held by defendant against plaintiff;

(b) compensatory damages against defendant in the amount of $20,703, and a decree rendering null and void any debts or other obligations owed by plaintiff to defendant;

(c) punitive damages against defendant in the amount of $500,000;

(d) interest and plaintiff's reasonable attorney fees incurred herein;

(e) all other legal and equitable relief which the Court deems appropriate.

Plaintiff demands trial by jury of eight on all issues triable of right by a jury.

McDONALD, HOPKINS & HARDY CO.,
L.P.A.,
GEORGE L. McGAUGHEY,
THOMAS W. KEEN,
Attorneys for Plaintiff.

EXHIBIT A

SAVIN CORP.,
Valhalla, N.Y., March 26, 1982.

Re Ohio Business Machines.

THOMAS W. KEEN, Esq.,
McDonald, Hopkins & Hardy,
Cleveland, Ohio.

DEAR TOM: Savin is prepared to offer your client, Rich Nelson and OBM, the sum of $20,703 in full settlement of their claims against Savin provided that (1) OBM returns the three machines identified by Savin as qualified for repurchase, (2) returns the machines owned by Savin but included in their inventory repurchase schedule and, (3) returns the other machines owned by Savin and not yet returned. There are a total of nine machines in the possession of OBM which, according to our

records, belong to Savin. If OBM has sold any of these machines, or for any reason is unable to return them, we would be prepared to take money instead.

We would, of course, expect general releases to be exchanged by the parties.

Best regards.

Sincerely,

JOAN CLEVELAND, Esq., *Chief Counsel.*

EXHIBIT B

MCDONALD, HOPKINS & HARDY CO., L.P.A.,
Cleveland, Ohio, March 31, 1982.

Re Ohio Business Machines, Inc.

SAVIN CORP.,
Valhalla, New York.

Attention: Joan Cleveland, Esq.

DEAR JOAN: I have been authorized on behalf of Ohio Business Machines, Inc. (OBM) to accept the offer extended by you on behalf of Savin Corporation in your letter of March 26, 1982. Based upon such offer and OBM's acceptance thereof, OBM has proceeded to conclude its transaction with HPS Office Systems, Inc. You will recall that such transaction involved the sale of the existing Savin accounts of OBM and the sale of certain tangible personal property in connection therewith.

If you have not already done so by the time you receive this letter, please provide me with the serial numbers for the machines which your records indicate are owned by Savin Corporation but are in the possession of OBM. Once I receive that information, my client will make arrangements for your local representatives to pick up the equipment. If the specific machines identified by such numbers are no longer in OBM's inventory, equivalent machines will be provided. Such equipment will be delivered to your representatives at OBM's premises in exchange for a certified or cashier's check in the sum of $20,703 and a signed release of any and all claims by Savin Corporation against OBM or any affiliate of OBM. At such time, OBM will provide Savin Corporation with a similar release. Enclosed are proposed drafts of such releases.

Thank you for your cooperation in disposing this matter. Please call me as soon as possible.

Very truly yours,

THOMAS W. KEEN.

RELEASE

For good and valuable consideration, receipt of which is hereby acknowledged, Savin Corporation hereby releases and discharges Ohio Business Machines, Inc., its predecessor and constituent corporations, and the employees, agents, officers, directors and shareholders of each, from any and all claims of whatsoever nature which it may have against them, or any one of them, as of the date of this release, including but not limited to any claim based on any alleged outstanding account balances, or breach of contract.

SAVIN CORP.

RELEASE

For good and valuable consideration, receipt of which is hereby acknowledged, Ohio Business Machines, Inc. and Richard P. Nelson hereby release and discharge Savin Corporation from any and all claims of whatsoever nature which they or any of them may have against it as of the date of this release, including but not limited to any claim based on alleged violations of antitrust laws, fraud or breach of contract.

OHIO BUSINESS MACHINES, INC.,
RICHARD P. NELSON, *President.*

Senator KASTEN. Mr. Nelson, thank you.

The final witness on this panel is Mr. Robert C. Goldberg of Freeman, Atkins & Coleman, Ltd., Chicago, Ill. Mr. Goldberg.

Mr. GOLDBERG. Mr. Chairman, Senator Exon, thank you very much. My name is Bob Goldberg. I am a member of the firm of Freeman, Atkins & Coleman, in Chicago, and I also have the honor of serving as general counsel to the National Office Machine Deal-

ers Association and several other trade associations in the office products industry.

On behalf of these thousands of independent small businessmen, we support the Office Machine and Equipment Dealers' Act, S. 286, because we are for good faith in presenting, describing, and negotiating dealer contracts; good faith in performing and complying with dealer contracts; good faith in concluding our contractual relations, and for the timely supply of parts and supplies; for 60 days' notice of a new dealership in our areas, for the right of a personal representative in negotiating a contract; and for the right of free association.

Our opposition represents several of the world's largest corporations who are opposed to these concepts in their business relations. Some of our opposition, in fact, are specifically excluded, yet they will come before you today and speak against this bill, but let us address the concerns of the opposition, and specifically, Mr. Chairman, I would like to address the issue which you have raised in regard to the necessity of this legislation, and that was whether existing law is adequate at both the State and the Federal level, and the answer to that based on facts is clearly no.

Let us look at them one at a time, and look at some specific cases. Our previous testimony which you have been gracious enough to include in the record included a story of Loy's Office Systems, in LaGrange, Ga., a dealer terminated by an office products company which did not repurchase inventory, who after 18 years as a dealer did not even have his dead inventory repurchased, and had no right of action.

That testimony included the story of P&S Business Machines, who had a dispute with Olympia in Alabama. Mr. Steve Phillips came before Congress last year and told how he has been through two trials, and now I can add that he has been through an appeal and faces a third trial, because there is no clearcut State law for him to base his cause of action upon.

And today I will add another one, a gentleman by the name of Mr. Dick Shock, from National Micrographics right here in Silver Spring, Md. He brought a cause of action in Silver Spring against Oce Industries, based on breach of contract, oral and written fraud, and he was awarded by the jury $25,000, however, the court came back and the judge said, I am going to give you a dollar, because the verdict is not consistent with the State law.

Senator, I would like to suggest that even closer to home, in Wisconsin itself, one of two States in our Nation, they have passed the Wisconsin Fair Dealership Law, because existing laws are not sufficient to address these wrongs. Now, you say we should look at the contracts in terms of negotiating these matters. It begs the question. There is an imbalance in the negotiations between manufacturers and dealers. We are dealing with giant, multinational concerns against dealers who have very few employees, less than $1 million in sales.

They cannot negotiate. They must accept. They must bear. They must live with it. The UCC does not apply to those contracts. We have heard the UCC will remedy all our problems. The UCC applies to the sale, the present sale of existing identified goods, or to a contract where the parties agree to the sale of specific goods at a

future time. It does not apply, Mr. Chairman, to the relationship created by dealer agreement. Those are not the sale of goods. Those are the relationship aspects. And the UCC does not cover it.

Just last year in the State of Michigan in *Lorenz Supply* v. *American Standard,* this very problem was pointed out, distinguishing between the sale of goods and the relationship aspects of an agreement, and the court came back and said the UCC will not apply to the relationship, only the sale of goods which is governed by purchase orders and bills of sale.

Franchise laws are not adequate. Franchise laws specifically exclude sales made at a bona fide wholesale price, the exact circumstances under which these gentlemen purchased their office equipment. The antitrust laws, both State and Federal, apply to conspiracies and restraint of trade. The arbitrary, capricious conduct of manufacturers in exerting their power upon office products dealers is not a conspiracy, it is a unilateral action, and therefore not covered.

The Federal Trade Commission, and Commissioner Douglas did not point out, has no private right of action under section 5 of the FTC Act. State and Federal—little FTC acts which have been invoked by many, many States apply to consumer transactions, not to business relations such as this.

I could go on and on, but my time is limited, but I think that each and every aspect and area of the law which has been mentioned is not applicable. We will not burden the Federal courts through this legislation. The Automobile Dealer Day in Court Act has resulted in an average of 25 suits per year, less than 1 per district. We are talking about very minor judicial intervention.

But we are talking, Mr. Chairman, Senator Exon, about guidelines for manufacturers and dealers alike, rules of the road to follow in their contractual relations. This bill is essential. Mr. Kuchta said there were 762 business failures last year, small businessmen out of business because of abuses that they suffered. I think it is time that we did not consider what the effects on IBM, 3M, and Xerox would be, but the small mom and pop operations which are being hurt very drastically.

We appreciate your time and your consideration.

[The statement follows:]

STATEMENT OF ROBERT C. GOLDBERG, ESQ., FREEMAN, ATKINS & COLEMAN, LTD.

Good morning. My name is Bob Goldberg, an attorney with the law firm of Freeman, Atkins & Coleman, Ltd., in Chicago, Illinois. In addition to serving as General Counsel to the National Office Machine Dealers Association, our firm represents over twenty-five trade associations, many of which are part of the office products industry.

Through these Hearings on the Office Machine and Equipment Dealers Act, S. 286, it is clear that the Committee will be afforded an opportunity to learn of the extreme difficulties being faced by America's small businesses and in particular, those engaged in the sale of office equipment. The dominance of Japanese companies in supplying sophisticated office products to United States business and businessmen has advanced at a speed which the laws of our land have not matched. It is due to this extreme imbalance that legislation in the form of the Office Machine and Equipment Dealers Act, is vital to the survival, vitality, and future of our nation's independent office machine dealers.

As General Counsel to the National Office Machine Dealers Association, I have had the privilege of working with office machine dealers throughout the United States. My initial association with the group came from a recognized expertise in

the antitrust and trade regulation areas of the law. Prior to becoming a partner in Freeman, Atkins & Coleman, Ltd., my career was dedicated to government service in the pursuit of preserving competition and protection consumers from abuses in the marketplace. As an Assistant Attorney General for the State of Illinois assigned to the Antitrust Division, a vigorous enforcement effort was engaged in to protect business and consumers alike. Following service to the State of Illinois, employment at the Federal Trade Commission ensued. Here I served as lead counsel in In the Matter of Borden, Inc.—The ReaLemon Monopolization Case, and as co-counsel in the bait and switch case against Sears, Roebuck & Company. Currently, I serve as Chairman of the Illinois Franchise Advisory Board, a former member of the Board of Directors of the Chicago Chapter of the Federal Bar Association, and a member of the American and Chicago Bar Association's Antitrust Committees.

Throughout my career I have lectured for the Florida and Illinois Institutes for Continuing Legal Education. I have authored numerous publications, including "Antitrust for the General Practitioner," "Combinations and Conspiracies," (1977); "Current Business and Legal Problems of Franchises," "Federal Law Considerations", (1978); "Federal Regulation of Franchises," "The Federal Trade Commission Rule," (1978); and "Business and Legal Problems of Franchises," "Termination; Refusal to Renew; Assignments," (1982). I have litigated multidistrict antitrust matters throughout the country and have earned the respect of co-counsel and opposing counsel alike. It is hoped with this background you will perceive a career dedicated to the enforcement of strong antitrust laws and the preservation of a free and competitive economy; an objective fully consistent with the goals of the Office Machine and Equipment Dealers Act.

Today marks the fifth Congressional Hearing on the serious problems facing the office products industry. These hearings have spanned a four year period and although some of the problems which have been presented are now corrected in certain product categories, the problems have resurfaced as new products and technology are introduced into the market place. At the National Office Machine Dealers Association we like to refer to this phenomenon as the three C's.

The story of the three C's began with the introduction of the electronic calculator. This office product represented a revolution to an industry which was known for years by mechanical equipment. With electronic technology came strong end-user demand and thus, maximum profits. Many companies not prepared for this strong demand came out with electronic calculators which had not been fully tested or proven. Corporate legal staffs aware that products were not reliable insisted upon dealer agreements which afforded maximum protection for the manufacturer. These one-sided contracts presented on a "take it or I will offer it to your competitor basis" served as the genesis for a seriously imbalanced industry. The abuses have been related to Congress by office equipment dealers from throughout the country. Today, problems with calculators are few, but manufacturers have perpetuated the same abuses with the introduction of copiers and computers—our second and third C's.

The Office Machine and Equipment Dealers Act, promotes competition and fairness, and is the only viable solution to a most serious problem. The problem is one of small businessmen being commercially abused by large, multinational corporations. Is not possible to analyze this problem without first considering the environment in which the independent office products dealer must attempt to survive.

My counseling of independent office machine dealers has revealed that they are not allowed to conduct their businesses in a free and competitive atmosphere. Rather, these small businessmen must survive with the constant threat of intimidation, coercion, and possible termination. Typically, a NOMDA member is carrying on a business which his father started. Most dealers handle two or possibly three product lines of the various manufacturers. A manufacturer's rep spends considerable time demonstrating why a new product is worth taking on, since it has capabilities that no competing product possesses. After convincing the dealer to take the product, the rep presents a contract for the dealer's signature. The dealer, realizing the unfairness of the agreement, demands certain modifications of the contract which the rep flatly refuses. If the dealer persists, the rep often states he will offer the line to a competitior, and given this choice, the dealer reluctantly agrees to sign in order to preserve the goodwill he has established. The rep leaves stating that the initial machine and parts order will be delivered in thirty days.

The dealer, excited with his new line, adds a new salesman and technician to handle the products. The eager saleman makes several sales and assures his customers installation in thirty days. The technician attends, at dealer expense, training school and awaits the opportunity to install and service the equipment. Thirty days pass and the dealer has yet to receive machines or parts. The dealer's customers are

demanding their machines and the relationship built on years of trust and friendship, begins to sour.

Finally the machines arrive, approximately thirty days late, and are installed. The customer immediately notes that the machines do not have all the capabilities which the salesman suggested in his presentation which itself was based on the representations of the manufacturer's rep. Furthermore, the machine has broken down and the dealer has yet to receive his parts order.

The dealer, ready to do anythng to maintain a relationship with his customer, is forced to strip a new machine for its parts. Despite the dealer's efforts, he learns that the problem can only be solved through installation of a retrofit kit which is currently backordered. A retrofit is nothing more than certain parts which allow the machine to function as originally promised, and, furthermore, the dealer must install the kit at his own cost.

Despite this adversity, and at a significant investment, the dealer makes it through the first year, and then sits down with his rep to renew his contract, since most dealer agreements only extend a year at a time. As the dealer has reached his quota, the rep is pleased to announce it will be doubled for the following year. No explanation is given as to why twice as a many machines are expected to be sold. In reality, if every dealer sold his expected quota, the manufacturer would, in most instances, be unable to deliver all the product.

The dealer survives his second year with many of the same problems, but fails to reach his increased and unrealistic quota. His reward is the appointment of another dealer in his territory of termination. The new dealer moves in, and has the built-in advantages of existing advertising and product recognition, for which the original dealer receives no compensation. If the dealer is terminated, he is left with lease agreements and service contracts on which he cannot deliver. The cost to our economy is significant.

This pattern perpetuates itself with dealers and end-users as the victims. The manufacturer's objectives are met because a maximum number of machines are sold. The manufacturer's reputation is not tarnished, for it is the dealer who has all contact with the end-user. Moreover, the dealer, not the manufacturer, issues the warranty to the end-user, leaving the manufacturer further insulated from problems. The only winner in this oft-repeated scenario is the manufacturer, certainly not the dealer or end-user.

After hearing this story, one may ask: Why not use alternative sources of supply? The answer is simple—none are available. Until recently, the Japanese have effectively eliminated all American manufacturers of office machines, an effort which they also pursued in the automobile industry. Foreclosure of Japanese products is not the answer—a balanced industry is. To this end, NOMDA delegations traveled to the Far East attempting to negotiate equality, with no success. Finally, it was determined that the only solution was legislation, hence the Office Machine and Equipment Dealers Act.

Opponents of S. 286 have criticized the Office Machine and Equipment Dealers Act on several bases. Some of the opponents are not even covered by the provisions of the Bill, others criticize provisions that are no longer included in the pending legislation, and finally, several opponents interpret provisions of the Bill in a manner which defies common sense. One thing is certain though, and that is opponents of S. 286 are strongly against a balanced industry, good faith conduct, adequate notice of significant market changes in a dealer's area, arbitration of disputes, free association, and the right to be represented by counsel. By examining each of their objections, it is clear that they are without merit.

A. INDEPENDENT OFFICE PRODUCTS DEALERS ARE FAILING AT AN ALARMING RATE, THUS DEMONSTRATING THE SERIOUS PROBLEMS BEING FACED

NOMDA, through its Manufacturer/Dealer Relations Committee, attempts to assist dealers with industry problems. This effort was originally handled by the Chairman and other volunteers. Due to the volume of complaints, in 1982, a full time staff attorney was added to assist dealers with their problems. In the past year, approximately 2,500 requests have been received from dealers needing assistance. Almost 300 of these required action by the Manufacturer/Dealer Relations Committee. Forty of these have resulted in requests for assistance from the NOMDA Legal Defense Fund.

Earlier this year, a school district in the State of Wisconsin was unable to obtain service on a copy machine it had purchased from an independent office products dealer. The dealer had gone out of business due to the broken promises of its supplier. The story being well known in the area, the supplier was unable to secure an-

other dealer and thus, there was no qualified technician with parts to service the equipment. When the school district contacted the manufacturer, it was informed that they would not service the product but the customer must look to the dealer, and of course, there was none. Only through the dedication of Senator Kasten and the assistance of NOMDA was the school district able to obtain service. Unfortunately, this result is the exception rather than the rule. The abuses of manufacturers are resulting in failing businesses and significant numbers of end-users unable to obtain the benefits of their purchases. The Office Machine and Equipment Dealers Act would ensure that end-users and dealers would no longer suffer the abuses of suppliers.

Bruce C. Cotton, Vice President of Public Affairs of Jerrico, Inc., a franchisor of 1,157 restaurants and an early opponent of the Office Machine and Equipment Dealers Act who since has withdrawn his opposition, stated it best during the Senate Commerce Committee Hearings held in the last session:

"The five distinguished witnesses who preceded me convinced me without a doubt that they have a problem. They have a problem within their industry and apparently a problem with our allies. So I hope you, in all your wisdom, can resolve their problem, because I'm leaving here this morning convinced that they do have a problem." (Tr. p. 61)

More recently, Mr. Jules Steinberg, Executive Vice-President of the National Association of Retail Dealers of America (NARDA) met with NOMDA officials to learn firsthand of our problems. Following this meeting, NARDA, an original member of the Coalition For Competition, was convinced of the need for S. 286 and the seriousness of the problems faced by independent office products dealers. It is noteworthy that NARDA has withdrawn from the Coalition and has become an active supporter of this legislation. With knowledge as to the problems, the solution is simple—S. 286.

B. FEDERAL AGENCIES, DEPARTMENTS AND COURTS HAVE TURNED THEIR BACKS ON THE SMALL BUSINESSES OF THE INDEPENDENT OFFICE PRODUCTS DEALERS, FOR NO ADEQUATE REMEDIES EXIST

Countless dealers have approached the Antitrust Division of The Department of Justice and the Federal Trade Commission only to be told that the laws they administer are not applicable; the matter is a "private controversy"; or the agency is without sufficient resources to look into the matter. The Sherman Act of 1890 and the Federal Trade Commission Act of 1914 simply are not appropriate to address the complexities of dealers' problems.

The Sherman Act requires "a contract, combination, or conspiracy in restraint of trade" to become applicable. The dominance of a single company over a small business fails to meet these statutory requirements. Utilization of Section 5 of the Federal Trade Commission Act to remedy coercion, intimidation, and other abuses is futile for the independent dealer, for no private right of action exists. Likewise, the use of the Federal Trade Commission's Rule regarding franchise sales is of no help. This trade regulation rule, through the Commission's Interpretive Guides, does not cover transactions where sales are made at a bona fide wholesale price—precisely the situation at hand.

Dealers do have an opportunity to have their disputes heard in Federal Court, but they do not have a remedy once the problem is heard. It is correct that in those controversies where the dealer and manufacturer are in different localities and the amount in controversy exceeds $10,000.00, diversity jurisdiction opens the door to federal court. The real issue is, once the door is open, what law is the Court to apply? The answer is that there is no codified guide for a federal judge to follow. A judge must try to work with inapplicable state and federal laws, such as the Sherman and Federal Trade Commission Acts, which do not address the problems. The key is not a vehicle to enter federal court, but rather a statute and remedy to address the problems. S. 286 will provide the remedy which does not now exist.

Congress has heard firsthand of the unfortunate circumstances which Mr. Steve Phillips of Birmingham, Alabama, faced at the hands of a foreign supplier. Mr. Phillips had an exclusive contract with Olympia when he left his business one day for a short vacation. During his absence, three of his key employees, in collusion with Olympia, took Mr. Phillips' business records and set up a competing Olympia dealership down the street. The first trial resulted in a three million dollar jury verdict for Mr. Phillips, which the trial judged reversed. At the conclusion of the plaintiff's case during the second trial, the judge dismissed the case. Both cases were appealed together and in June of this year, the Eleventh Circuit Court of Appeals reversed the judge on the previous two cases and ordered a new trial. Now, facing the costs of

a third trial, Mr. Phillips perhaps will be able to receive the value for what was wrongly taken from him. However, the message is clear—if S. 286 had been law, these judges would have had clear guidelines to follow, rather than fashioning rules from laws which do not address the complex issues presented.

Critics of S. 286 also contend that even if problems exist, they basically can be resolved through litigation over the contracts entered. This argument neglects to address the problem of unequal bargaining power which does not allow for fair, negotiated contracts in the first instance. As was pointed out in the manufacturer-dealer scenario above, contracts are presented to dealers with instructions to return same without modification in a very short time or face the prospect of no longer receiving machines, parts or supplies. A dealer's survival is dependent upon the receipt of machines, parts and supplies in order to maintain his rental base and meet the obligations of his service agreements. These one-sided agreements provided the dealer with no rights against the manufacturer and further require that any litigation take place in the supplier's hometown. Today's significant costs of litigation, coupled with the prospect of a dealer being away from his business for an extended period of time to try a matter, render litigation unfeasible. S. 286 will insure that contracts are fair and equitable and stand for a balanced relationship between manufacturers and Dealers.

C. THE UNIFORM COMMERCIAL CODE APPLIES TO THE SALE OF GOODS, NOT THE AGREEMENT ESTABLISHING THE MANUFACTURER/DEALER RELATIONSHIP

Congress has been constantly advised that all of the problems faced by the independent office products dealer are covered by existing state law, the Uniform Commercial Code. The U.C.C. is designed to apply to the sale of goods and fills any gaps which the parties may have omitted in their negotiations. However, the U.C.C. is not designed to apply to the relationship of the parties as established by agreement. Without the sale of a tangible product, the U.C.C. would have no application, whereas a manufacturer/dealer relationship can exist without the sale of goods.

The U.C.C. will not balance an industry which is heavily weighted towards the supplier. The U.C.C. will not help a dealer obtain compensation for good will established and a loss of an asset which has been taken prematurely. The U.C.C. will supplement missing forms in the sale of goods, but has been seen, this is not the problem being addressed in S. 286.

D. THE ESTABLISHMENT OF INDUSTRY RULES WILL RESULT IN FEWER CONTROVERSIES

It is noteworthy that opponents who would caution against increased litigation under S. 286 would readily suggest the same matters be litigated in a different context. However, litigation is not the solution provided by the Office Machine and Equipment Dealers Act, rather a guide for conduct is established. S. 286 will afford those guidelines for acceptable conduct. If the rules are broken, then—and only then—will litigation ensue. The office products industry is without guidelines for conduct and thus, both the manufacturers and dealers search for proper standards.

If precedent can predict the future, then the race to the court house will be entered by very few. Following the enactment of the Automobile Dealers Day in Court Act, an average of twenty-five cases per year have been filed. This is of the potential thirty thousand automobile dealerships in the United States. Twenty-five additional cases in the United States District Courts will have absolutely no effect on the burdens they now carry. Rules will create guidelines instead of controversy. As shown in Mr. Phillips' situation, had S. 286 been law, the result would have been one trial instead of three.

Significantly, the Office Machine and Equipment Dealers Act will not increase the Federal budget a single cent. No new agency or Commission will be formed. S. 286 will be enforced through the courts where the costs are borne by the litigants through their filing fees. If twenty-five cases per year proves accurate, less than one case per district will be filed, thus eliminating any need for additional jurists as a result of the Bill. The Federal Bureaucracy will not be increased through S. 286.

E. COMPETITION IN THE OFFICE PRODUCTS INDUSTRY WILL BE INCREASED THROUGH PASSAGE OF S. 286

The fear that S. 286 is anti-competitive and is injurious to consumers and end-users is without merit. The office products industry includes more than four hundred manufacturers. Each of these offers a full line of products, in many instances accounting for twenty or more separate and distinct units. To suggest that S. 286 is anti-competitive is to ignore the serious interbrand competition which takes place

among dealer equipment sold. In fact, the Office Machine and Equipment Dealers Act will increase competition, for dealers will have the security of knowing they are creating an asset for themselves intead of their suppliers. Currently, dealers are reluctant to invest heavily in a single line for fear of arbitrary termination. By removing this constant fear, dealers will be willing to invest in a line and as a result, present a more formidable competitor in the marketplace. Dealers will become more efficient and thus, the economy will benefit.

It is often asked why, with so many manufacturers, don't dealers merely change products to avoid the abuse. Office products are mostly sold on a lease basis with an accompanying service agreement. These coustomers become a base upon which a dealer builds his business and establishes his reputation. It is essential to success to be able to properly service these customers. The dropping of a product line often results in an inability to obtain from a manufacturer parts or supplies or obtain such at dealer cost. If this occurs, the dealer risks losing his customer base and thus, everything he has built. For this reason many manufacturers begin a relationship fairly and and then become more repressive as their grip on the dealer tightens.

When Ricoh, a Japanese copier company, entered the United States market, they granted their dealers exclusive contracts for their territories. When the first contract expired, so did the exclusive territories. Now a dealer faces sharing all of his labors with another dealer who did not bear any of the cost. Nothing in the U.C.C. or state law will preserve for the dealer that which he had initially and subsequently was taken away. S. 286 does.

F. S. 286 ALLOWS THE TERMINATION OF NONPERFORMING DEALERS

The Committee should recognize that distribution objectives of manufacturers and suppliers will be maintained through S. 286. The basic premise of the indusry is that where a dealer is making his mutually agreed upon quota and paying his bills, a manufacturer-supplier has no reason to appoint another Dealer. If a Dealer does not perform as he promised, then S. 286 will not preserve him, and that is how it should be.

A careful reading of S. 286 reveals that termination of inferior dealers is fully contemplated. Section 201(a) provides that: "This subsection shall not apply to the termination of a dealer agreement for just, good or significant cause." This section is included in S. 286, and rightfully so, in order to assure that unsatisfactory dealers are not preserved through legislation. NOMDA firmly believes that a dealer who fails to substantially perform as agreed, should not continue to represent a supplier. S. 286 reflects that belief.

G. THE TERMS OF S. 286 ARE SPECIFIC AND CLEAR

Any difficulty of opponents to S. 286 in comprehending the term "good faith" should not be surprising, for it is their lack thereof which warrants this legislation. S. 286 defines "Good Faith" as "the duty of each party to any dealer agreement, and all officers, employees, agents, or other representatives thereof, to act in a fair, equitble manner toward each other so as to guarantee each party freedom from coercion, intimidation, fraud, or unconscionable conduct by the other party . . . "Good faith is a well recognized term, commonly interpreted by the courts. Section 1-201 (19) of the Uniform Commercial Code defines "good faith", as "honesty in fact in the conduct or transaction concerned". The U.C.C. definition of good faith is far less specific than that in S. 286, yet the courts have had no difficulty with this definition and there is no reason to believe this will change with S. 286.

The good faith test is particularly useful in solving the problems facing the office machine dealer. It is a concept familiar to legislators and courts in many areas: from the 25-year old Automobile Dealers Day in Court Act to labor laws to basic tenets of contract law. Good faith is a term sufficiently flexible to provide a remedy for the prevasive excesses of manufacturers who, insulated by the manifest disparity in bargaining power, have not been compelled to bargain or act in a fair, ethical and equitable manner. These abuses take many forms and, of necessity, must be treated on a case-by-case basis. In fact, the House Judiciary Committee in favorably reporting out the Automobile Dealers Day in Court Act in 1956 (S. 1379), stated in its committee report that "[T]he existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct." (House Report No. 2850, 84th Congress 2nd Session (1956 U.S. Code & Administrative News, p. 4603).

Establishing a list of prohibited and permitted actions would be counter-productive. No list could cover all the possible forms of abuses; furthermore, loopholes can easily be devised in even the most comprehensive list to defeat the intention of the

legislation. Also, such a detailed approach could constitute an unduly restrictive burden on the daily business life of manufacturers. The purpose of S. 286 is not to tell anyone how to run his business, but merely to establish the other parameters. S. 286 will establish the basic principle upon which both manufacturers and dealers can base their actions without significant intrusions into the day-to-day decision-making process.

The "good faith" test would not, however, be overly vague. As mentioned above, courts have been interpreting good faith in a variety of contexts for may years. We believe that it is vital to continue the development of a practical standard of good faith that reasonable businessmen can use in their arms-length dealings within the commercial reality they both face.

A useful example is the Automobile Dealers Day in Court Act, which uses a comparable definition of good faith to that in H.R. 1159. Under the Automobile Dealers Day in Court Act, "good faith" is defined as "the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party." (15 U.S.C. §§ 1221-1225). Over twenty years of case law indicate that courts have had no difficulty in defining "good faith" within the context of each case presented to them under this statute. In all instances, the courts have been careful to view a manufacturer's actions with an eye toward actual or threatened coercion or intimidation. It is highly doubtful that anyone would seriously argue that good faith is an inappropriate standard on which to base business dealings.

S. 286 addresses another issue of vital concern to office machine dealers. That concern is the way in which manufacturers dilute the existing dealer's principal sales area. Manufacturers accomplish this dilution in two ways: by establishing other dealers in close proximity to existing dealers, and, even more pernicious, by creating in such areas direct retail sales operations which these manufacturers wholly own.

The dealer views his market area as the dealer's geographic selling area of responsibility as defined in a dealer agreement, or, if not defined in a dealer agreement, the geographic area near the dealer's primary place of business in which the dealer principally conducts its business, including selling the product, servicing the product, and in other ways satisfying the needs of the end-user. In nearly every case, a dealer will sign a contract with a manufacturer to market a given product or products within a generally defined geographic area. In situations where an oral contract exists, the understanding is verbal.

Opponents to S. 286 have suggested that Section 101(5) is too broad, unclear and conflicts with the antitrust laws of the United States. A careful reading of S. 286 shows that this section only requires notification of the establishment of a new dealer in an existing dealer's territory. Notification, like good faith, is hardly a controversial subject, but rather expected conduct of reputable businesses. This section will prove to increase competition, in that it will permit an existing dealer an opportunity to modify his maketing plan in order to meet his new competition.

Additional terms contained in the Office Machine and Equipment Dealers Act are found in other statutes which courts have administered without difficulty. (See, Wisconsin Fair Dealership Law, Wis. Stats., Ch. 135.03(2), California Gasoline Dealer Act, Cal. Corp. Code, § 20999.2, Automobile Dealers Day in Court Act, 15 U.S.C. § 1225, Illinois Motor Vehicle Franchise Act, Chapter 121-1/2, § 751-64). In conclusion, if the Committee shares any definitional concerns, these should be remedied during mark-up where NOMDA would be pleased to assist.

By presenting these responses to opposition previously raised, it should be clear that the Office Machine and Equipment Dealers Act is sound legislation addressed to an industry's serious problems. Like the gasoline industry, automobile industry, and the soft drink bottlers, it is time to remedy the serious problems existing in the office products industry.

If you have any questions, I would be happy to respond.

Senator KASTEN. Mr. Goldberg, thank you. I just have a couple of brief questions. Then I am going to yield to Senator Pressler, who has conflicting schedules this morning, but wanted to be here to address some questions and comments to this panel.

First of all, Mr. Goldberg, you mentioned that Wisconsin has passed a law which solves at least part of these kinds of problems. What other States have done that, and is a State-by-State solution a realistic possibility?

Mr. GOLDBERG. There are two other States which have termination type statutes. New Jersey is one of them, which only applies to the portion of our bill regarding termination. Hawaii has recently passed legislation similar to S. 286, before you now. I think that the Congress has learned through the Petroleum Marketing Practices Act that where there were 48 States that had specific State statutes regarding the oppressive behavior of multinational oil firms on their dealers, that one Federal codified uniform set of rules is the correct answer, and not piecemeal legislation on a State-by-State basis.

When I get a call, and I got one yesterday, prior to coming here, from a Wisconsin dealer, I was able to help him and his attorney going through the Wisconsin Fair Dealership Act, because it was a termination situation. Had he been next door in Michigan or Minnesota, or to the south in Illinois, I would have told him that he was not as fortunate as a Wisconsin dealer. I do not think that rights and obligations and good faith should be governed by where you live. I think America stands for that, and Congress should show that.

Senator KASTEN. Mr. Doss, I was troubled by your suggestion that the only two people who really are in the game are the dealer and the consumer. Are you suggesting that the manufacturer does not have a concern about his reputation in the marketplace?

Mr. Doss. Well, Chairman, I can only give you the example of my own case. I purchased the product from Panasonic and paid for it. I employed the staff to service it, supply it, deliver it to the end user. The end user in turn purchased it from me and expected me, sir, to deliver what I had promised to deliver to them. But whenever I received my cancellation, and since then I have had to hire legal counsel to confront Panasonic for the purpose of delivering to me supplies and parts on a timely basis.

And it has been most difficult, sir, to go to my customers and to explain to them that I am now having problems getting product from the supplier because the supplier chose to select another dealer and to cancel my franchise.

What it has done for me, sir, is put me in a very bad light in the marketplace that I have made the investment. My word to the customer, the end user, I plan to protect. So, therefore, I am at a disadvantage in having to go out and pay additional fees out of my own pocket to supply to the customer; and it has caused a lot of problems because I have to call other Panasonic dealers that are friends of mine trying to get them to send product to me, et cetera, et cetera, et cetera.

What that does for the end user, sir, which I have several of these units in the field, is they pay the price, they trusted my franchise because I was—my company because I was a franchised, authorized dealer of Panasonic; now all of a sudden I am not.

Now, the letter, sir, that I have right here from Panasonic, which we are going to introduce as part of my testimony, just states that—

PANASONIC INDUSTRIAL CO.,
DIVISION OF MATSUSHITA ELECTRIC CORP. OF AMERICA,
Secaucus, N.J., April 13, 1983.

DOSS & PRICE OFFICE SYSTEMS, INC.,
Joplin, Mo.

GENTLEMEN: Pursuant to paragraph 23(a) of the authorized dealer agreement entered into between our companies as of April 27, 1982, this letter shall constitute notice of termination of Doss and Price Office Systems, Inc. as an authorized dealer of Panasonic copier products. This termination shall become effective 45 days following the mailing of this notice.

Please note that this termination will operate as an automatic cancellation of any deliveries of the products which are scheduled to be made subsequent to the effective date of termination, whether or not any orders for the products were previously accepted by our company. Also, as of this date, as of the date of this letter, all sales and deliveries of products to your company will be on a cash basis only.

Very truly yours,

KOICHIRO (JOE) KURITA,
General Manager, Copier Products Division.

Now——

Senator KASTEN. I misunderstood you then. You did not mean to say that Panasonic does not care about the reputation of Panasonic in the marketplace. That is what I thought you were suggesting. I'm sure Panasonic does care about the reputation of Panasonic in the marketplace. What you are concerned about is the relationship between you and your suppliers.

Mr. Doss. Because of their ability to cancel me and to not do business with me as they have been in the past, the customer and I are sitting there without the ability to manufacture the product, which I cannot do; then I am not able to deliver to the customer on a timely basis what I have sold to him. So, therefore, maybe they are not, but it comes out to the end user that I am a bad guy and that I now am up for litigation from these people because I cannot deliver. And I have had to hire legal counsel. I have even had to go in, sir, and exchange the copiers, take a Sharp brand and just move the Panasonic out, move the Sharp in brand new, and do that to avoid litigation from the end user.

[The following information was subsequently received for the record:]

WEIL, GOTSHAL & MANGES,
Washington, D.C., October 13, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Subcommittee on Consumer, Senate Committee on Commerce, Science, and Transportation, Russell Senate Office Building, Washington, D.C.

DEAR CHAIRMAN KASTEN: On September 14, 1983, Henry E. Doss, Vice President of Doss & Price Office Systems, Inc., testified before the Senate Subcommittee on Consumer of the Committee on Commerce, Science, and Transportation on the Office Machine and Equipment Dealers Act—S. 286. The purpose of this letter is to address Mr. Doss' testimony with respect to our client, Panasonic Industrial Company ("PIC"). I respectfully request that this letter be included in the record of the September 14 hearing, and that it appear in the printed report of the hearing immediately following Mr. Doss' testimony.

Mr. Doss, a retail dealer of copiers, computers and typewriters, complained about Panasonic's recent decision to terminate the manufacturer-dealer relationship. He further claimed that he was terminated for "no particular reason." In PIC's view, the facts are quite different.

The Doss & Price account was opened in May 1982. Through March of 1983, the dealer's account was past due for November and December of 1982 and for January and February of 1983. Moveover, even though Doss & Price had signed a purchase order in October of 1982 for 20 machines, it accepted only seven. From December 1982 to March 1983, nearly half the period of the manufacturer-dealer relationship, Doss & Price did not accept a single additional Panasonic product.

Thus, when PIC decided in April of 1983 to terminate its relationship with Doss & Price, it based its decision on both his failure to pay his bills and his failure to move PIC's product. It also hoped, of course, that it could find a dealer who would represent its product enthusiastically and effectively. Only with such dealers can PIC truly compete with the many other office equipment manufacturers who work just as hard as it does to sell products.

Doss' complaints about the burdens of carrying Panasonic inventory are also unfounded. Considering how few machines his company accepted, he never really had any inventory to speak of; of the 25 units he bought from PIC overall, he had only 4 left as of March 1983. Also, his claim that the reputation and good name of his company are at stake because he is unable to "provide service to [his] customer base without any parts for the Panasonic machines" is baseless. PIC's policy with respect to spare parts is to provide them on demand.

PIC's problems with Mr. Doss illustrate clearly why S. 286 should be defeated. S. 286 would make it more difficult and costly to replace poorly performing, nonpaying dealers with efficient, effective ones.

Thank you for the opportunity to include this in the hearing record. If you have any questions, please feel free to call me.

Respectfully submitted,

NANCY L. BUC.

Senator KASTEN. I have just one further question, and then I intend to yield to Senator Pressler for his comments.

There is a different group, the National Office Products Association. They have not testified, but they have submitted testimony that will be included in the record which opposes your group.

Now, I understand that we have two essentially rival trade organizations in the industry, is that correct? And if you could, could you explain to me why one trade organization has one position and the other trade organization has the other?

We understand their membership is roughly the same, 4,000 or 5,000. I guess yours is 6,000. But why are you not united on one side or the other?

Mr. KUCHTA. First of all, their opposition stems from their executive committee which is dominated by manufacturers. NOMDA is a dealer association; NOPA is a dealer association of manufacturers directly involved in the operation of an association.

Senator KASTEN. The other group has both manufacturers and dealers in it and yours has no dealers at all?

Mr. KUCHTA. No. Ours has all dealers. We have associate manufacturer members, but they do not have a vote in our association.

Senator KASTEN. Are the dealers in NOPA in opposition to or in support of this bill?

Mr. KUCHTA. NOMDA took a survey of the NOPA members, and 99 percent of them, the results that I testified a few moments ago, 99 percent said they agree with a fair and equitable statute; 94 percent said they support the bill.

Now, that is what the members of NOPA, the dealer members of NOPA stated in the survey results of their membership.

Senator KASTEN. Your answer to my question is that the statement does not reflect the dealers in that organization, is that what you are saying?

Mr. KUCHTA. That is correct, Mr. Chairman.

[The following information was subsequently received for the record:

NATIONAL OFFICE PRODUCTS ASSOCIATION,
September 19, 1983.

Hon. ROBERT KASTEN,
Chairman, Subcommittee on Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On September 14, 1983, during your Subcommittee's hearing on the Office Machine and Equipment Dealers' Act, S. 286, certain references were made to the National Office Products Association (NOPA) and our opposition to this legislation. Mr. John Kuchta, President of the National Office Machine Dealers Association (NOMDA) responded to this reference.

We found Mr. Kuchta's comments to be very misleading. We respectfully request this letter be considered as a correction and that it be included in the official record of the hearing by your Subcommittee.

Mr. Kuchta stated that the Executive Committee of the National Office Products Association is controlled by manufacturers. This statement is incorrect.

The NOPA Executive Committee, the policy making body of NOPA, is composed of 13 people. Seven (7) members are dealers, four (4) are manufacturers, one (1) is a wholesaler and one (1) is a sales representative. Moreover, we refer you to our written statement to the Subcommittee in which we state: "It is important to emphasize that dealers constitute the majority of our membership, hold all chief elected national offices and maintain majority control of Association committees, all in accordance with the bylaws adopted in 1904."

Mr. Kuchta mentioned a survey of NOPA members his Association conducted and that the results of this survey indicated support for the legislation. This assertion is most misleading.

First, this survey was answered by only 157 dealers who belong only to the National Office Products Association. We point out to you that NOPA represents over 4,000 dealers.

Second, the survey question to which Mr. Kuchta referred had nothing to do with the legislation under consideration. Specifically, the survey question was: "Do you agree that Manufacturers and Dealers should treat each other in a fair and equitable manner?"

It is our opinion this was a leading question, the response to which was highly predictable and yielded a favorable response percentage that is really quite meaningless. Indeed, NOPA does not disagree with the obligation of people or companies to treat each other in a fair and equitable manner. Again, the question was not connected to the legislation under consideration nor answered by anything that would begin to approach a statistically valid sampling of NOPA members.

We regret the references and thrust the above will correct the record.

Sincerely yours,

DAN P. SCOTT, *President.*

Senator KASTEN. Senator Pressler.

Senator PRESSLER. Thank you very much. I shall be fairly brief.

First of all, I thank my colleagues for yielding. I have a hearing in another committee going on that I demanded be held, so I have to attend that if I am going to keep my commitment.

But I think that this is a very important hearing, and the work we are doing here is extremely significant. And I say that as a cosponsor of the bill, but also, I have been increasingly concerned with this business of taking responsibility and of leaving some of our local dealers holding the bag, so to speak, with responsibilities which others make the profit and make the sales perhaps and do not provide the service.

In my State of South Dakota that has been a real problem. When we had this hearing, this same hearing a year or a year and a half ago, some of my businessmen were here to testify. They are not here today, but they will be submitting some written testimony. It is a particularly great problem in South Dakota where we do not have great corporate headquarters, but we have a lot of small businessmen.

As a member of the Small Business Committee, I have heard many stories similar to the ones we have heard here today. I have six questions, but I am only going to ask two of them here, and then I am going to ask the rest for the record.

I would like to ask the panel why should broad terms such as good will, good faith, fair and reasonable compensation, et cetera, be incorporated into Federal statutes when it simply turns the matter back to the courts for clarification? Cannot a more narrow piece of legislation be designed to reach the same goals incorporated in S. 286?

Does anyone have a comment on that?

Mr. GOLDBERG. Thank you, Senator Pressler.

I believe that my written testimony has addressed some of the definitional issues that have been raised regarding S. 286. I would say that each of the terms that you have mentioned, and rightfully so, are terms that the courts already are comfortable with due to their experiences with other statutes and other provisions. Good will in the sale of a business is always a factor, and something both accountants, lawyers and courts deal with on a daily basis—fair, reasonable, equitable. In fact, if you even look directly at the UCC, which everyone has been mentioning this morning, in terms of their definition of good faith they say means honesty, in fact, in the conduct or transaction occurred.

I scratched my head for probably two semesters in law school over that definition, and I think ours as good faith in terms of fair and reasonable conduct, fair and ethical conduct, is much more specific and easier for the court to deal with.

Congress in the past in landmark legislation, going back to Senator Sherman in 1890 with the Sherman Act, legislated unreasonable restraints of trade, and let the court look at these matters on a case-by-case basis. As the Supreme Court even said in a pornography case: I do not know how to tell you what it is, but I sure know it when I see it. And that is a terrible misquote, but that is the message that got across.

I think these terms are easily understandable and workable by the judicial system and dealers and manufacturers alike.

Senator PRESSLER. Another thing that each of you could provide or anyone in the room—and you have done some of this—we are trying to develop five or six classic cases. Can you give me some examples of cases of this nature that you have tried to bring to court through the normal route and why have they failed. Some of you have done that, but that is a question I am asking for the record.

We are collecting cases of where people have tried to go through the normal route and have failed. So in addition to these examples brought, if people have some capsule cases that we can use, it would be very helpful in arguing this matter.

Finally, why does not current law, common law, contract law, antitrust law, business torts, UCC, and other State laws, provide you adequate relief for the problems you encounter? Some of you have answered that already, but if any of you have anything to add on that, I would like to hear it.

Mr. GOLDBERG. I think that each of those areas that you brought up, the UCC applies to the sale of goods, and the sale of goods is

governed by a purchase order issued by Mr. Ayres' establishment, or Mr. Doss', or Mr. Nelson's to the manufacturer, which is then followed up by a bill of sale. Those are the transactional documents which cover that sale.

The relationship aspect of it, which is a dealer agreement which contemplates, and as courts have looked at, an ongoing economic relationship is not a sale of goods, and therefore not covered by the UCC.

Yes, the UCC will fill in the gaps where there is a sale of goods, and the merchants have forgotten some of the specific terms. They will take what is readily acceptable between people in that category and in that industry, but they will not write into a relationship terms of commitment, terms of that understanding between them if it does not apply to the specific sale of goods.

And that is why the courts have found—and I mentioned the *Lorenz* case, and we will give you a list of citations where dealers have failed, where they have gotten—interestingly enough, what happens in most of the situations, the dealer gets a judgment because a jury of his peers just like the Senators here today hear these problems, and they are outraged, and they come back and they give a judgment. And then the judge has to take that judgment and apply it to the law. And we are finding in 80 to 90 percent of the cases there is a judgment notwithstanding the verdict. It takes the jury judgment, very unusual, and tosses it out because the law is not right, and it is not.

I would have liked to ask Commissioner Douglas or the Department of Justice, our Nation's law firms, how many actions and how many investigations are brought in this industry, how many times they have stepped in with these statutes which are appropriate in their minds for these wrongs.

We know the answer to that question, and they are not going to have any significant statistics to tell you, because they tell us in all of our letters—and we have a stack of them—it is private controversy where we do not have the right vehicle.

S. 286 is the right vehicle, Senator.

Senator PRESSLER. In other words, they have never used their authority to protect the small businessman where it might be very much required and needed in such cases, nor have they even investigated?

Mr. GOLDBERG. They have not.

Senator PRESSLER. I also will submit that question to them for the record. I think that is a good one.

Mr. Chairman, I have six questions for the record. I apologize for leaving because I asked you to hold this hearing. I want to commend you and Senator Exon for your great leadership in bringing up some of these matters. This hearing falls on the exact same day that over 3 months ago I got a commitment to hold a hearing in another room, and so I am spreading myself thin this morning.

Senator KASTEN. Without objection, Senator, your questions will be submitted to the witnesses. We thank you for your participation here this morning.

Senator Exon.

Senator EXON. Thank you, Mr. Chairman.

Senator Pressler, thank you very much for breaking away from the important meeting in the Foreign Relations Committee. We appreciate your being here, and we appreciate your cosponsorship of the bill.

Mr. Chairman, let us get into this matter of competition a little bit. There has been a great case made out of this—some indication that this bill is anticompetitive by people, including some nationally known economists who are usually wrong on almost everything given the expertise they supposedly have with regard to competition.

Unless you have been in this business or begin to understand it, you might not be able to see the need for S. 286. It seems to me that what we are coming down to here is a classic confrontation between the small, independent, family owned businessman and the very largest of the largest corporations, the multinational corporations, if you will.

Let us talk about competition just a little bit. I am afraid that unless the committee and the Congress is very careful, they might be snowed with the idea that this is indeed special interest legislation only to protect some small, independent businessmen.

To the contrary, the independent businessman out there, the office machine dealer is one who provides not only the service, but he provides the facilities to sell the products of major manufacturers. And as I indicated earlier, to a large extent those are foreign manufacturers today.

Let us talk about competition just a little bit. Rather than take a lot of time, I would just like to have maybe two of you answer this question for me.

John Kuchta, how many office machine dealers or suppliers in a city of Lincoln, Nebr., which is a medium-size city, how many people are actively engaged in a business way with supplying—let us just take one thing—office copiers in Lincoln, Nebr. today? And then maybe to give some other to see if it is true across the country, maybe you could tell us, Mr. Doss, how many are in the office machine copying business in Joplin, Mo.

John.

Mr. KUCHTA. Senator, I have never counted, but there is too many. It is a very competitive industry. There are literally dozens of dealers and direct factory branches that we compete against on a day-in-day-out basis, and office copiers is an example.

Senator EXON. Is it also true that you can buy some office copiers in department stores or discount stores or through catalogs?

Mr. KUCHTA. It is becoming a commodity product where it can be bought at other than office machine or branch offices, yes.

Senator EXON. The point I want to make, in Lincoln, Nebr., for example, there is just not two or three places where a businessman could go to buy a copying machine. There are a great number, are there not?

Mr. KUCHTA. Literally dozens in a town the size of 150,000 people.

Senator EXON. Is the same thing true in Joplin, Mo.? How large is Joplin, Mo.?

Mr. Doss. 39,386 people. Yes, sir. Probably 13 to 14 different sources are available to the end user for just copiers, and if you add computers and typewriters to that, there is more than that.

Senator EXON. I think, then, we should maybe understand, Mr. Chairman, for the record I want to state and maybe get your input into this committee who are on the firing line down there. All too often I think that we feel that when we get into the matter of products, we look at something like the automobile industry where we have three or four major manufacturers domestically and a whole number coming in from overseas. And I suspect to a much larger extent that office products—people buy a Chevrolet, a Ford, a Chrysler, or any other General Motors product, or a Toyota or what have you, a Volkswagen, overseas manufacturer, the national advertising probably has much more of an impact.

It was my experience, at least when I was in the business that you people are in, that the customer in Joplin, Mo. buys primarily not on name but on the basis of reputation of the dealer that he knows who advertises locally, who advertises his product locally, who has been there. And most important of all in the office machine dealership business it seems to me that he should recognize that it is just not a Minolta, it is not a Xerox, it is not a name; it is basically what the customer is buying is the service and reputation behind the dealer in the individual area.

In other words, it makes little difference to an insurance company what the name-brand is on the product that he has sitting there in his office on which he wants to make copies, for example, to use one important end of your business. And certainly, if that machine does not work, then it does not make any difference what the name is on that product, he is going to call that dealer that sold him the product.

I think, Mr. Doss, that is why I really understood the points that you were making. Here you have sold the products, and now you cannot get the parts to make good the contract, in essence, that you made with the person that you sold to.

Now, is it not true that for the most part—well, let me put it this way. What percentage of your sales—and I want each one of you to answer this question—what percentage of your sales of all office products that you handle would you fairly estimate are as a result of somebody who calls up and says I want a certain typewriter or a certain copier, a certain dictating machine? What percentage of the sales are name sales and what percentage of the sales out of your particular business comes as a result of that customer knowing you, having done business with you before and says I need a typewriter, a copying machine or a dictating machine; what do you have to offer; and will you come over and demonstrate it.

My point is, what percentage of the sales do you think honestly out of your business are as a result of your initiative and your standing in the community as opposed to a name brand?

Mr. KUCHTA. To answer the question, I think that less than 10 percent of the products that we sell are as a direct result of them wanting a specific brand name. They are wanting Lincoln Office Equipment's service reputation, support reputation.

I think that the products that we do sell where they call up and say I want an XYZ product is a result of our service and support

reputation in the community and is an add-on sale because of that, not because of brand-name loyalty.

Senator EXON. Or, John, if I was a potential customer and I called up Lincoln Office Equipment Co., and if I said, John, I want to buy a Xerox copying machine, and if you do not handle Xerox copying machines, you would probably say to me we do not handle Xerox, but we have a competitive brand that we would like to show you. Is that the way it works?

Mr. KUCHTA. That is correct.

Senator EXON. Mr. Ayres, what percentate of those sales in your business do you think are as a result of name brand buying or as a result of your service and reputation in the area that you serve?

Mr. AYRES. I would have to say 90 to 95 percent is a result of our initiative, because we contact customers proactively. We invite them to try and buy our products.

Senator EXON. Mr. Doss, is that true with you?

Mr. Doss. Yes, sir. And I think that you have brought up an excellent point, Senator; that not only the end user, which is the customer in my area, is anxious to do business with me because of my ability to service and take care of the equipment. At the beginning of the relationship with these large manufacturers, sir, they also are excited at that point to use my company, my people and my services as an avenue to place their equipment. So over 90 percent of our sales comes from our initiative, and that is what the manufacturer is really out for is to take a much less cost in delivering his product to the end user through us.

Senator EXON. I do not know about your particular market area, Mr. Doss, and I do not know anything about Panasonic. I do not remember handling any of their products. But it seems to me that most of the people in Joplin, Mo., would not know much about Panasonic, and I do not imagine that they would want to buy Panasonic if Panasonic were out there selling through a mail-order catalog. They probably are only buying Panasonic basically because of the Doss Co.'s reputation and the service which indicated you would stand behind it after you sold it to them.

Mr. Doss. That is accurate, sir.

Senator EXON. Mr. Nelson.

Mr. NELSON. We have our own local advertising program. Also, the manufacturers have their advertising. For every 100 leads that we get, 98 are calling our company specifically; 2 are from the manufacturer specifically requesting a brand name. There are 42 copier manufacturers in the United States. There are over 150 computer and word processors. There are 50 typewriters. Many of these companies do private label manufacturing. They take the product and paint them a different color and call them a different name and market them through Sears. Ricoh does this, Sharp does this. There is so much intrabrand and interbrand competition.

In Cleveland, Ohio, IBM has 900 employees alone in the community, as does Xerox. They are national brands represented with their own direct offices, plus well over 100 dealers represented in our local NOMDA. There is more competition in this industry. It is literally unbelievable. And nothing in this will be anticompetitive.

But I did want to mention one additional thing that Senator Kasten asked: Does the manufacturer care about their service relationship? And I do not think that that may be clear yet.

The simple facts are this, Senator. When a dealer is canceled, in the vast majority of cases he is immediately canceled from acquiring parts and supplies from that manufacturer.

Now, in Mr. Doss' case he has 200 Panasonics in the field. They are all on service contracts with him that are an ongoing relationship. I have 150 Xeroxes in the field that have the same relationship. I am canceled like that. No longer can I honor my obligation to my customers. Therefore, they cannot get the service that they have paid for. Therefore, they not only end up hating me, but they hate their product.

Does it indicate to you that a manufacturer that would do that to an end user cares what the end user thinks about them? The facts are so clear that the manufacturer has a very moderate or virtually nonexistent concern for the end user. And in your own statement, NOMDA was actually involved in some catholic school in the Milwaukee area that generated about 50 phone calls who could not get service for their Toshiba machine, and fortunately, NOMDA was able to intervene because the manufacturer would not give them any service. And they called your office to get some form of relief, and they could not get any, and the manufacturer would not give them any.

The manufacturer has no obligation. They legally have no obligation, and apparently of late, morally they do not either. It is not like the automobile business where there is a Chrysler zone office that you can call and they will come out and fix it for you and do a whole bunch of no charges on the bill. They do not give service; they just sell; and it is up to the dealer to do it. It is the clearest issue of this whole bill.

I would hope that there is no confusion on it.

Thank you.

Senator EXON. Thank you very much.

Mr. Chairman, I have no further questions.

I thank very much the panel for their informative testimony once again.

Senator KASTEN. I would also like to thank the members of the panel for their helpful testimony.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. Would each member of your panel (except your legal counsel, Mr. Goldberg) please provide the following information:

How many different product lines do you now carry?

Answer.

HENRY E. DOSS. 4.

JIM AYRES. We currently carry five product lines. Work Processing, Typewriter, Calculators, Copying Machines and Computers.

JOHN KUCHTA. My firm, Lincoln Office Equipment, is a full-line business equipment systems retailer. In the machines division of my firm, we market word and data processing equipment, dictation equipment, phone answering equipment, as well as calculators, typewriters, and copiers.

I presently handle six major product lines.

Question. How many suppliers do you represent?

Answer.

HENRY E. DOSS. 9.

JIM AYRES. We represent eight suppliers.

Olivetti Computers; Syntrex Word Processing Machines; Sharp Electronic Typewriters; Olivetti Electronic Typewriters; Adler/Royal Electronic Typewriters; Sharp Calculators; Victor Calculators; and Sharp Copying Machines.

JOHN KUCHTA. At the present time I have a contract dealer agreement with ten manufacturers.

Question. Do you represent more than one supplier in some product lines? If so, what is the largest number of brands you typically carry in any one product line?

Answer.

HENRY E. DOSS. (1) yes (2) 4.

JIM AYRES. The largest number of brands we carry in one product line is three.

JOHN KUCHTA. I do handle products from more than one supplier in a product line. The largest number of brands I handle in one product line is copiers with three.

Question. Roughly how many suppliers have you represented over the last 10 years?

Answer.

HENRY E. DOSS. 14.

JIM AYRES. We have represented eleven or twelve suppliers over the last ten years, including the eight listed above.

JOHN KUCHTA. 13.

Question. Have you ever declined to represent a supplier that has approached you? For what kinds of reasons?

Answer.

HENRY E. DOSS. Yes.

(1) Quality of product; (2) restrictions on territories; (3) poor support; (4) cost of product; (5) quotas too high; and (6) one-sided contract.

JIM AYRES. We have declined to represent some suppliers who approached us because of:

(1) Low profit margins; (2) poor reputation for fair dealings; (3) poor reputation for product designs; (4) timing inappropriate; (5) we did not need an additional line of that kind, at that time; (6) contract weaknesses; and (7) inability to agree upon quotas.

JOHN KUCHTA. Yes. Over the past 12 months, I have declined to represent two manufacturers because they would not negotiate the terms of their contract. In both cases I asked them to include the following four items in their contracts:

(1) To include language that would require the manufacturer and the dealer to treat each other in a fair and equitable manner during the contract term.

(2) The quota or annual budget of equipment to be purchased by the dealer from the manufacturer would be mutually agreed upon.

(3) Provided that I, the dealer, pay for the equipment on a timely basis, and meet the mutually agreed upon quota, as well as live up to the other terms of the dealer agreement, the dealer would continue to be the "dealer of record" for the manufacturer.

(4) If for any reason a dispute arose between the manufacturer and the dealer, that the contract includes specific language for arbitration of the dispute.

In both cases, the manufacturers did not agree to a single item I requested.

Question. Has there ever been an occasion in which you voluntarily ended your relationship with a supplier? If so, did you continue to service your customers with products from that supplier? How? Have you ever voluntarily ended your relationship with one supplier in a given product line and commenced representing a competitive supplier in that same line?

Answer.

HENRY E. DOSS. (1) yes, (2) yes, (3) buying parts and supplies from other dealers, (4) yes.

JIM AYRES. There have been occasions in which we voluntarily ended relationships with a supplier. We did continue to purchase parts and supplies from the supplier in order to service the customer. We have voluntarily ended a relationship with one supplier of a given product line and simply continued representing competitive suppliers in the same product line. It was not necessary for us to take on an additional product line.

JOHN KUCHTA. I have never voluntarily ended a relationship with any supplier. I have been cancelled by manufacturers in the past and even when cancelled, I have continued to service my customer, the end-user. I was able to continue to service my customer base by stripping brand new machines down for parts. Since I have never

voluntarily ended a relationship with a supplier, the answer to the last question in letter "f." is no.

Question. Have you ever offered to service equipment that was sold or leased to the end-user by another dealer? Has another dealer ever serviced equipment sold or leased by you?

Answer.

HENRY E. DOSS. Yes/yes.

JIM AYRES. In some lines of products, we have offered to service equipment sold or leased to the end-user by another dealer. In some lines of products, other dealers have serviced equipment sold or leased by our firm. These things have never happened in some product lines where the machines have such a bad service reputation that we would not want to become involved with them nor would competitive dealers want to take over the service we are obligated to perform.

JOHN KUCHTA. It is my company's policy to offer service to all end-users that own equipment we are factory-trained to service and can obtain parts for. To my knowledge, no other dealer in our market area has serviced equipment sold or leased by our firm.

Question. Have you ever offered to sell or lease equipment requiring service which you were unable to perform due to the geographic distance of the end-user or any other reason?

Answer.

HENRY E. DOSS. No.

JIM AYRES. Yes.

JOHN KUCHTA. If a piece of equipment is sold to a customer for delivery outside of my "prime area of responsibility" as specified in my dealer agreement, I make arrangements with the dealer of record in the territory the machine is being shipped to. These arrangements would include complete delivery and installation to the end-user's satisfaction Other than an "inter-territorial" sale which I have outlined above, I have not offered to sell or lease equipment outside of a geographic area which I can service.

Question. Have you ever obtained replacement parts from a source other than the manufacturer, for example, from another dealer or the aftermarket? Have you ever sold parts to another dealer?

Answer.

HENRY E. DOSS. Yes/yes.

JIM AYRES. Yes, we have obtained replacement parts from sources other than the manufacturer upon occasion. Sometimes we can do this without any trouble and other times the dealers resist cooperating with us because of threats made by the manufacturers. We have sold parts to another dealer.

JOHN KUCHTA. My dealership makes every attempt to service our customer. As mentioned earlier, we will even go to the extent of stripping a brand new piece of equipment for parts to repair a customer's piece of equipment. This would not be necessary if we were assured a continuous supply of parts, as proposed in S. 286. In both the 97th and 98th Congress, through Senate Hearings, I and many of my fellow dealers have demonstrated, through our formal testimony, that dealers have typically been the "guinea pigs" in the business equipment industry. In a rush to maintain a competitive edge, many manufacturers allow the dealer community to do the field testing, unbeknownst to the dealer. Much of the equipment that has been sold through dealers over the past few years has had very little, if any, field testing. The only way you can establish a parts usage history is to test the failure rate of specific parts on a piece of equipment to determine the high mortality parts. In many cases, since this was one in the dealer's office rather than in the manufacturer's laboratory, the dealer had to wait for months in many cases to obtain replacement parts. Rather than jeopardize an account relationship, most dealers would resort to stripping brand new machines of parts to keep their customers happy. Since the warranty is passed on to the dealer rather than the end-user in our industry, all warranty responsibility and performance liability lay on the dealer. In many cases, the dealer agreement forbids the dealer from selling parts, supplies, reference manuals to unauthorized parties. To sell parts to another dealer as your question asks, would, in many cases, violate a dealer agreement and jeopardize the ongoing relationship of the dealer and manufacturer.

To answer your question directly, I have never sold parts to another dealer if he was unauthorized to service the equipment or was in direct violation of my dealer agreement.

Question. One of NOMDA's central arguments in support of S. 286 is that contract law is inadequate to protect dealers in their commercial relationships with suppliers. Please provide specific examples of lawsuits demonstrating this inadequacy. In

particular, please provide specific examples where a dealer unsuccessfully sued a supplier under state contract law where that dealer would have won the suit if S. 286 were the law of the land. In describing each such example, please state clearly: (1) the reasons the dealer lost its contract suit, (2) the perceived inadequacy in contract law, and (3) the way in which S. 286 would cure that inadequacy. Please attach copies of all relevant court opinions. Please provide all such examples NOMDA knows about.

Answer. As demonstrated during the Hearings held by the Consumer Subcommittee in regard to S. 286, the Office Machine and Equipment Dealers Act, this question neglects the fundamental problems between manufacturers and Dealers by focusing on the end result of a controversy between the two. The relationship between manufacturers and Dealers is currently extremely unbalanced in favor of the manufacturer. Contracts are presented on a "take it or leave it" basis, affording the Dealer no chance to negotiate fair and reasonable clauses for his own welfare and legal interests. Thus, in most contracts, in order to merchandise the line, a Dealer is forced to waive his normal contractual rights both under common law and the Uniform Commercial Code. The basic purpose of S. 286 is not to create a federal right of action, but rather to bring good faith to all phases of the contractural relationship. Under S. 286, a Dealer will now be in a position of equality with a supplier, and thus negotiate contractural provisions which will serve the asset he is developing for himself and the manufacturer.

Clearly, where a dealer has waived his rights by contract it is difficult to pursue those rights in a court of law. As has been testified to, competent counsel has repeatedly advised clients not to litigate, since the potential for success is remote and the cost of litigation is significant.

However, there have been cases where the conduct of a manufacturer is so oppressive that legal action was pursued under a theory that the contract was one of adhesion entered into through a manufacturer's fraud and thus, should be interpreted against the manufacturer. The best example of such a matter is *P & S Business Machines* v. *Olympia, U.S.A.*, 707 F.2d 1321 (1983). Here, Mr. Philips brought an action against Olympia only to receive a jury verdict in his favor which subsequently was overruled by the Court. Had S. 286 been law, Mr. Phillips would have prevailed, in that clear guidelines would be in existence to have supported the jury's conclusion. Unfortunately, Mr. Phillips has been forced to pursue two trials and one appeal for the privilege of litigating the matter a third time. This incredible waste of judicial time is a result of the absence of clear cut standards to judge a manufacturer's conduct. S. 286 would provide guidelines for the evaluation of conduct and more importantly, provide all parties with standards by which they should conduct themselves.

Currently, manufacturers in their contracts provide that the written agreement is the sole and exclusive understanding of the parties. Such provisions are commonly referred to as "merger clauses". Through these provisions manufacturers remove the oral promises and assurances made to dealers in persuading them to take on the product line. This lack of good faith will be eliminated through the passage of S. 286. It is impossible for the National Office Machine Dealers Association to determine the total number of abuses which were not litigated due to one-sided contracts, which competent counsel advised would preclude recovery. It is possible to advise of the hundreds of complaints received by the Association's Manufacturers/Dealer Relations Committee and Staff Attorney regarding the lack of good faith of manufacturers in their relations with Dealers. S. 286 is necessary because Dealers are burdened with unfair contracts which preclude them from obtaining redress for wrongs committed. This question focuses on a remedy which does not now exist instead of the problem which is now real—unfair contracts.

Question. In Mr. Goldberg's July 1983 article in the "NOMDA Spokesman," he stated that "(In the 1980's) dealers have turned from product confrontation to seeking contracts which established a balanced relationship. This, coupled with significant changes in the law, has presented the dealer with an opportunity to exist under a dealer contract which can become an asset to his business." What are these "significant changes in the law"?

Answer. The 1980's have brought significant changes in the antitrust laws and particularly, the interpretations regarding vertical restraints. The United States Supreme court has changed from a position virtually prohibiting territorial restrictions to one holding that they are legal when they do not unreasonably restrain competition. As courts now rule on particular aspects of exclusive dealership arrangements in cases before them, the definition of "unreasonably restraining competition" keeps evolving. Office machine dealers are affected by these rulings as are dealers in all other industries.

The nation's antitrust laws regulate all business relations, including those between manufacturers and dealers. The Sherman Antitrust Act prohibits all contracts, combinations and conspiracies "in restraint of trade." Recognizing that virtually every business arrangement is somehow "in restraint of trade," the Supreme Court long ago broke down antitrust violations into two categories. Certain business practices were considered so inherently adverse to the free enterprise system that they were ruled per se illegal, that is, illegal in and of themselves. Price fixing is an example of a per se violation. All other types of business practices are examined to see if they unreasonably restrain competition. The courts apply this "rule of reason" by considering the business justification for the challenged practice against its effect on competition in the marketplace.

In 1967 the Supreme Court ruled that the strict territorial restrictions which the Schwinn bicycle company imposed on its dealers amounted to a per se antitrust violation. *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967). Practically speaking, this meant that a manufacturer could not effectively grant territorial exclusivity because it could not restrict competing dealers of the same product from selling in the same territory. Ten years later, the Supreme Court virtually overruled the *Schwinn* case by ruling in *Continental T.V., Inc.*, v. *GTE—Sylvania, Inc.*, 433 U.S. 36 (1977), that it would apply the "'rule of reason" to vertically imposed business restraints (i.e., restrictions a manufacturer would impose, "from the top", upon its dealers). This, in effect, opened the door for manufacturers to grant dealers territorial protection where it is necessary to help the dealers compete effectively.

Two recent actions by the Federal Trade Commission (FTC) indicate that the federal government is understanding that protected territories are needed for dealers to compete and market their products effectively. The FTC scrutinized and approved the distribution system of Beltone Electronics (a manufacturer of hearing aid products), which was based on exclusive dealerships. *In re Beltone Electronics Corp.*, FTC Docket No. 8928 (7/6/82). Among other restrictions imposed on its dealers Beltone requires them to sell only in their assigned territories and prohibits them from selling other hearing aid products and to unauthorized dealers.

The Commission focused on the effects these restrictions had on competition in the hearing aid market in general. It observed that competition is vigorous with new hearing aid companies entering the market and market shares shifting. The differing ways that the companies compete (some rely on professional referrals; others, like Beltone, rely on brand loyalty inspired by dealer service) means there is little likelihood of collusive activity at the manufacturer level or at the dealer level. And even though Beltone had the largest market share, that share had declined and the company was not using its exclusive dealership arrangements to exercise monopolistic power in the market.

The FTC looked not only to the effects on competition but also that exclusive territories were necessary to provide its dealers with the incentive to build full service dealerships. The hearing aid products they sell are complex electronic devices which require skilled dealers knowledgeable about their features and capable of providing service. The FTC was convinced by these arguments that the exclusive arrangements were not the result of a dealer cartel that forced the manufacturer to protect dealer territories.

In its other recent ruling, the FTC further defined the circumstances under which territories would be protected. The FTC allowed Lenox, Inc., a manufacturer of china, to prohibit its distributors from reselling Lenox products to unauthorized dealers. Although the FTC did not issue a detailed opinion as it had in Beltone, it apparently was needed "to protect [the company's] quality image and the investments of its quality dealers in support of that image."

For office machine dealers these developments mean that there may be a greater willingness to give some forms of exclusivity and territorial protection under the circumstances witnessed in these cases. These significant changes in the law remove the obstacle for a Dealer to be awarded an exclusive territory which can result in a product line becoming a more significant asset to his business.

Question. Please provide the precise text of any proposed changes to S. 286, along with a brief explanation and justification of such changes.

Answer. Please find attached a copy of S. 286 which includes NOMDA approved changes. For your convenience in making comparisons, the suggested changes are in italic. The language is technical in nature and is intended to clarify the bill.

Section 101 would be divided into subsections (a) and (b). Subsection (b) would apply the bill's good faith requirements and procedures for termination to dealers. This responds to the concern raised by some manufacturers that these provisions should specifically apply to both dealers and suppliers.

Section 101(a)(3) addresses the concern raised by some manufacturers that this provision could be used by dealers to obtain access to any item in the seller's product line notwithstanding the agreement between seller and dealer and notwithstanding the ability of the dealer to market and service such products or the seller's ability or desire to provide them. The suggested change makes it clear that the products and their parts, reference manuals and schematics are limited to those which have been agreed to by seller and dealer.

Section 101(a)(6) addresses a crucial issue facing dealers. Namely, once terminated, dealers are often unable to obtain at reasonable prices the parts, supplies, and technical information necessary to enable the dealer to meet the obligations of the dealer's service contract with its customer. As you know, there is virtually no aftermarket for these items and manufacturers are therefore sole sources for them. The severe adverse economic consequence dealers face from this problem is sometimes exacerbated where the seller refuses to repurchase the inventory of the terminated dealer. I hasten to add that section 101(a)(6) does not create an extraordinary right for terminated dealers. Usual standards of commercial reasonableness are not changed. For example, where a dealer was terminated for poor credit, it may be reasonable for the seller to require c.o.d. for deliveries made pursuant to section 101(a)(6).

Changes in section 301 are technical provisions to make that section conform to the provisions applicable to dealers outlined previously herein.

S. 286

A BILL To promote interstate commerce by regulating the contractual arrangements between suppliers and retailers in the office machine and equipment industry

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Office Machine and Equipment Dealers Act".

DEFINITIONS

SEC. 2. For purposes of this Act:

(1) The term "commerce" means commerce—

(A) within the United States;

(B) between the United States and a foreign nation;

(C) in any territory of the United States, among the territories, or between any territory and any State or foreign nation; or

(D) in the District of Columbia, or between the District of Columbia and any State, territory or foreign nation.

(2) The term "dealer" means any person, corporation, partnership, or other form of business enterprise resident in the United States or in any territory of the United States, operating under the terms of a dealer agreement and primarily engaged in the business of selling any office product of a supplier to an end-user of such office product, except that such term does not include a franchisee.

(3) The term "dealer agreement" means any written or oral agreement or contract between any supplier engaged in commerce and any dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract for a definite or indefinite period.

(4) The term "distributor" means any person, corporation, partnership, or other form of business enterprise engaged in the sale, consignment, exchange, or any other form of transfer of an office product which it manufactures, assembles, constructs, creates, or obtains in any manner from a manufacturer;

(5) The term "franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which—

(A) a franchise is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed or suggested in substantial part by a franchisor;

(B) the operation of the business of the franchisee under such plan or system is substantially associated with the trademark, service mark, trade name, logotype, advertising, or other commercial symbol of the franchisor designating the franchisor or its affiliates; and

(C) the person granted the right to engage in such business is required to pay, directly or indirectly, a franchise fee of $100 or more;

(6) The term "franchisee" means a person to whom a franchise is granted, or has been granted, or who participates in a franchise relationship as a franchisee;

(7) The term "franchisor" means a person who grants a franchise or participates in a franchise relationship as a franchisor;

(8) The term "good faith" means the duty of each party to any dealer agreement, and all officers, employees, agents, or other representatives of any such party, to act in a fair, equitable manner toward each other so as to provide each party freedom from coercion, intimidation, threats of coercion or intimidation, fraud, or unconscionable conduct by the other party, except that reasonable recommendation, endorsement, exposition, persuasion, urging, or argument shall not be deemed to constitute lack of good faith.

(9) The term "manufacturer" means any person, corporation, partnership, or other form of business enterprise engaged in the sale, consignment, exchange, or any other form of transfer of an office product which it manufactures, assembles, constructs or creates;

(10) The terms "office product" and "product" mean any physical object or office machine software which is designed primarily for use in an office *or business* environment and which has a *dealer cost* greater than $100 per item, except that such term does not include—

(A) carpets, chairs, couches, dental equipment, desks, dividers, draperies, lighting or lighting fixtures, medical equipment, office accessories, plants, sofas, stands, storage systems, tables, or textile products; or

(B) furniture designed specifically for integrated use with office machines.

(11) The term "supplier" means a manufacturer, distributor, or wholesaler engaged in commerce who enters into a dealer agreement with a dealer in order to supply the dealer with an office product, except that such term does not include a franchisor;

(12) The term "United States" means the several States of the United States, the District of Columbia; the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands; and

(13) The term "wholesaler" means any person, corporation, partnership, or other form of business enterprise engaged in the sale, consignment, exchange, or any other form of transfer primarily to a dealer of an office product which it obtains from a manufacturer or distributor;

TITLE I—CONTRACTS BETWEEN DEALERS AND SUPPLIERS

DUTIES OF SUPPLIER

SEC. 101. (*a*) Any supplier who enters into a dealer agreement with a dealer shall—

(1) act in good faith in presenting, describing or negotiating the terms or provisions of the dealer agreement to the dealer;

(2) act in good faith in performing or complying with any term or provision of the dealer agreement;

(3) furnish the dealer with *agreed upon* office products *and their* parts, reference, manuals, *and* schematics, on a timely basis;

(4) act in good faith in terminating, canceling, or refusing to renew the dealer agreement and, when applicable, comply with the procedures set out in title II;

(5) provide sixty days notice to the dealer when establishing a new dealership in the market area of the dealer. However, notification is not required where the dealer agreement does not specifically define the market area;

(6) provide the dealer, at the then current dealer prices, parts, supplies, and technical information for products sold for the longer of any existing customer agreement or five years from the date of sale of the product;

(7) allow the dealer the right to be accompanied by counsel or a personal representative to any meeting between the parties for the purpose of discussing any matter regarding the dealership or proposed dealer agreement; and

(8) allow the dealer the right of free association with other dealers for any lawful purpose.

SEC. 101. (b) Any dealer who enters into a dealer agreement with a supplier shall—

(1) act in good faith in negotiating the terms or provisions of the dealer agreement with the supplier;

(2) act in good faith in performing or complying with any term or provision of the dealer agreement;

(3) comply with the procedures set out in title II.

TITLE II—PROCEDURES FOR TERMINATION

SEC. 201. (a) A supplier may terminate a dealer agreement which contains a specified expiration date before such date, or terminate at any time a dealer agreement which does not contain a specified expiration date, by offering the dealer involved fair and reasonable compensation for the value of the dealer agreement to the dealership including a reasonable amount for goodwill. Such offer shall be made in writing not less than sixty days before the intended date of termination. This subsection shall not apply to the termination of a dealer agreement for just, good or significant cause.

(b) A dealer agreement which does not contain a specified expiration date or is terminated prior to a specified expiration date may contain a provision requiring arbitration relating to the amount of fair and reasonable compensation for the value of the dealer agreement to the dealership including a reasonable amount for goodwill. In the absense of such a provision, the parties to an existing dealer agreement may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.

(c) Arbitration of such disputes, awards by arbitrations and confirmation of awards shall be governed by title 9, United States Code, to the extent such title is not inconsistent with this section.

(d) An award by an arbitration shall be final and binding between the parties to the arbitration but shall have no force or effect on any other person.

(e) Notice of the filing of any request for arbitration shall be served upon the supplier involved, and such supplier shall not terminate or enforce the termination of a dealer agreement pending the outcome of such proceeding. The arbitrator shall award reasonable attorney fees and the cost of the proceeding to the prevailing party in any arbitration under this subsection.

TITLE III—MISCELLANEOUS PROVISIONS

PROCEDURAL REQUIREMENTS

SEC. 301. (a) Any party affected by a violation of the provisions of this act may bring an action for damages, injunctive relief or other equitable relief in any district court of the United States in the district in which the *party* resides, is found, has an agent, or does business.

(b) Except as otherwise provided in this Act, an action arising out of any provision of this Act shall be commenced not later than two years after a *party* discovered, or in the exercise of reasonable care should have discovered, that a violation had occurred. If a *party* conceals the cause of action from the knowledge of the person or entity entitled to bring such action, the period before the discovery of the cause of action by such person or entity shall be excluded in determining the time limit for the commencement of the action.

(c) The prevailing party in any action under this section shall be awarded reasonable attorney fees and the costs of suit.

WAIVER PROHIBITED

SEC. 302. Any condition, stipulation, or provision purporting to bind any dealer or person acquiring any dealership to waiver of compliance with any provision of this Act is void.

ANTITRUST LAWS

SEC. 303. Nothing in this Act shall be construed to repeal, modify, or supersede, directly or indirectly, any provision of the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), or any State antitrust law.

EFFECT ON STATE LAW

SEC. 304. Nothing in this Act shall supersede the right of any State to enact or enforce any law which provides additional or stronger standards, criteria, or remedies than those provided in this Act.

EFFECTIVE DATE

SEC. 305. The provisions of this Act shall take effect on the date of enactment of this Act, and shall apply to dealer agreements entered into on or after such date.

Question. Would a dealer's breach of contract constitute "just, good, or significant cause" justifying termination by a supplier under S. 286? If not, please explain your answer.

Answer. A determination of whether a dealer's breach of contract constitutes "just, good, or significant cause" justifying termination by a supplier will depend upon the facts of each case. It is basic principle of contract law that not every failure to perform is material enough to discharge the other party from his obligations under the contract. The procedures for termination provided in section 201(a) of S. 286 do not change this rule. Indeed, the good faith requirement of S. 286 compliments this rule.

Section 242 of the Restatement (Second) of Contracts provides that "[i]n determining the time after which a party's uncured material failure to render or to offer performance discharges the other party's remaining duties to render performance . . . the following circumstances are significant: (a) those stated in section 241; (b) the extent to which it reasonable appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements; (c) [time is of the essence]."

Section 241 of the Restatement (Second) of Contracts provides that the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing is a significant circumstance in determining whether a failure to render or to offer performance is material. The comments to section 241 state that adherence to the standards of good faith and fair dealing is not conclusive on the issue of whether a failure to render or offer performance is material. Similarly, non-adherence to these standards is not conclusive. Other circumstances may cause a failure not to be material in spite of such non-adherence.

Question. I would like to reconcile some conflicting evidence in your prepared statements on the ability of dealers to choose from among competing manufacturers of office products. On the one hand, you say that dealers are at the mercy of their suppliers. Mr. Goldberg said, "Why not use alternative sources of supply? The answer is simple—none are available." (page 6) Mr. Doss said, "dealers do not have a choice . . . our suppliers are limited." (page 6) Mr. Kuchta said, "dealers' options are severely limited." (page 8) The results, according to Mr. Goldberg, are "one-sided contracts presented on a 'take it or I will offer it to your competitor basis'."(page 3)

On the other hand, an article Mr. Goldberg wrote in July 1983 "NOMDA Spokesman" said "with all the computer entrants and changes in distribution of traditional product lines, a dealer is presented with many opportunities." Also, the statements of Mr. Goldberg, Mr. Nelson, Mr. Kuchta, and Mr. Doss, all say there are some 400 manufacturers in the industry. (a) How many suppliers are there? What products do they supply? (b) How many product lines will be covered by S. 282? What are they? What manufacturers currently produce products for each of these lines?

Answer. The office products industry is not limited to computers which, in fact, are the most recent entrant to the field. The typical office machine dealer may not have added computers to his product line of addressing machines, check writing machines, coin counting machines, copiers, cash registers, software, duplicating machines, dictating machines, data terminals, electronic calculators, facsimile transfer equipment, indentification systems, microfilm equipment, phone answering equipment, postage and mailing equipment, paper shredders, time recording machines, manual and electronic typewriters, and word processing equipment.

When a new product enters the marketplace, there usually is one manufacturer who is the leader, followed by several others who will, in essence, copy the originator's innovation. Initially, a dealer does have a choice and with new products, manufacturers are in certain instances, willing to negotiate contracts. In testimony, it was pointed out how Ricoh, a copier company, offered exclusive contracts when presenting their products. However, once the products were in the hands of dealers and a dealer network was established, new contracts were presented which eliminated exclusivity and many of a dealer's legal rights.

The office products industry does have hundreds of manufacturers[1] and initially, a dealer does have a choice. In the new developing computer industry, dealers can

[1] A list of manufacturers, wholesalers, and distributors of office products is attached hereto. [This attachment has been retained in committee files.]

look to many companies for products. In fact, dealers who originally looked to Osborne, Texas Instruments and Victor Technologies are now looking again, although it must be remembered that every dealer cannot carry the same product line and manufacturers themselves limit their representation. However, once a dealer chooses a supplier, his freedom of choice ends. Taking on a new product is analagous to starting a new business. A dealer must invest in inventory, training, advertising, and promotion. Once this investment is made, a manufacturer knows that a dealer has severely limited himself and cannot change products as he could initially. Also, the manufacturer knows that if the dealer does change lines, a new dealer would be eager to take over the previous dealer's investment in the product line.

Once a dealer selects a product line, he presents it to his customers who rely upon him for product evaluation and service. In fact, dealers enter into extended service contracts at the time of sale to assure customers that servicing of the product will always be available. Thus, if a dealer changes products after his commitment to a line he: 1) risks not being able to service the equipment due to an inability to get parts and supplies; 2) bankruptcy due to extended service contracts based upon the ability to purchase parts at dealer prices; 3) loss of his customer base to the "new authorized dealer"; 4) loss of investment in inventory, training, advertising, and promotion; and 5) loss of customer goodwill, for they relied upon his judgment in purchasing a product the dealer no longer carries.

Clearly, the testimony presented is fully consistent. A dealer's initial choice of suppliers is totally removed once a product line is determined. From that point forward the dealer is at the mercy of the manufacturer and, as pointed out, manufacturers have elected to exploit that relationship. S. 286 will return good faith the relationships of manufacturers and dealers of the products defined in Section 2(10) of the Bill.

Question. Mr. Ayres, like others of you, complained in his prepared testimony of an "evergrowing failure of manufacturers to provide reliable products." How is that concern reconciled with the following comment in Mr. Goldberg's article in the July 1983 "NOMDA Spokesman": "Frustrated end-users and dealers sued manufacturers for the problems experienced with their faulty equipment. In some instances these actions were successful. The lesson of the 1970's for manufacturers was that they must deliver reliable equipment and promote it accurately to the dealer and end user. Most have learned this valuable lesson."

Answer. As was pointed out previously, product innovation is typically accomplished by a single manufacturer and then copied by others. In a manufacturer's rush to have a product competitive to that of the innovators, there is insufficient time to test reliability. Thus, the end-user becomes the field tester to which the dealer is responsible. It is important to remember that a manufacturer's warranty extends to the dealer and not the end-user.

In a developing product segment reliability is a major problem until the time is established and supplier stability takes place. This phenomena was testified to as the three C's—calculators, copiers, and computers. When electronic calculators were introduced, severe reliability problems existed and the same was true for copiers. In fact, new model copiers are still plagued with problems. However, as these markets mature the products become reliable, dealers can begin to concentrate on sales rather than retrofits. Although certain product categories have matured, new product innovations present reliability problems.

At the forefront of current product reliability problems are computers and their attendant software. In an industry where obsolescence can take place over a span of six months, there is no time for adequate product testing. Thus, products are released and the end-user becomes the guinea pig. Manufacturers, recognizing their exposure, must go to great lengths to contractually limit their liability and further insulate themselves by not extending warranties to end-users, but only to dealers. The manufacturers of the 70's have learned the value of reliable products (calculators and copiers), but the 80's introduced widespread marketing of computers and hence, a new class of students.

Question. If an office product is defective, can't the dealer sue the manufacturer for breach of contract, as Mr. Goldberg suggests?

Answer. Yes. As has already been pointed out, however, the problem often does not involve the defective products. Wrongful termination, unilateral imposition of quotas, arbitrary non renewal and territorial degradation are not sales of goods involving a defective product, or any product at all. Also, the manufacturers often insist that various provisions be placed in contracts that effectively negate the dealer's opportunity to prosecute a civil suit under the common law of contracts.

Question. If this contract action already exists, please explain what is added by the requirement in S. 286 for "good faith" dealing.

Answer. Although contract actions under limited circumstances may exist, manufacturers, through one-sided contracts, extinguish a dealer's ability to bring such claims. S. 286 establishes a right of action through consideration of the entire transaction—the promises, the negotiations, the contract, the termination. Section 302 prohibits waiver of any of the provisions of the Office Machine and Equipment Dealers Act and thus, balance will be established in an industry where none now exists.

Question. Mr. Doss, what do you mean in your prepared statement by "oversaturation" of a "market area"? (page 4) Mr. Nelson, what do you mean by "inequitable placement of new dealers"? (page 10) Should the Federal government be involved in deciding how many (and where) dealers "should" be in a market? If so, is it realistic to believe such a planning approach could be administered through federal court litigation between manufacturers and dealers, as opposed to a national administration planning body?

Answer. Oversaturation?? In any given market there is a reasonable number of buyers. These buyers should have a good base of products to choose from to keep a competitive atmosphere and a quality product. Suppliers or manufacturers are of the opinion that the amount of buyers can be multiplied by introducing several new products and establishing several more dealers in one market area to sell them. This causes the oversaturation and pressures or forces the (dealers) to cut prices, services, personnel, etc., just to break even.

Protected franchises for quality dealers allow several out-lets for the customer because of the many manufacturers and yet they reduce the problems created when an individual manufacturer sets up six of it's own dealers in one city. Under the (Office Machine and Equipment Dealers' Act—S.286) the dealer would be able and willing to invest the monies to insure the quality service and support their customers deserve. The dealers potential return on his investment is protected.

Questions of Senator Pressler and the Answers Thereto

Question. You are no doubt aware of the objections to S. 286 that have been raised by opponents of that bill. Can you suggest changes to S. 286 that would be responsive to these points while retaining the remedial thrust of the bill?

Answer. Please find attached a copy of S. 286 which includes NOMDA approved changes.[1] For your convenience in making comparisons, the suggested changes are underlined. The language on page 3 is technical in nature and is intended to clarify the bill.

Section 101 would be divided into subsections (a) and (b). Subsection (b) would apply the bill's good faith requirements and procedures for termination to dealers. This responds to the concern raised by some manufacturers that these provisions should specifically apply to both dealers and suppliers.

Section 101(a)(3) addresses the concern raised by some manufacturers that this provision could be used by dealers to obtain access to any item in the seller's product line notwithstanding the agreement between seller and dealer and notwithstanding the ability of the dealer to market and service such products or the seller's ability or desire to provide them. The suggested change makes it clear that the products and their parts, reference manuals and schematics are limited to those which have been agreed to by seller and dealer.

Section 101(a)(6) addresses a crucial issue facing dealers. Namely, once terminated, dealers are often unable to obtain at reasonable prices the parts, supplies and technical information necessary to enable the dealer to meet the obligations of the dealer's service contract with its customer. As you know, there is virtually no aftermarket for these items and manufacturers are therefore sole sources for them. The severe adverse economic consequence dealers face from this problem is sometimes exacerbated where the seller refuses to repurchase the inventory of the terminated dealer. I hasten to add that section 101(a)(6) does not create an extraordinary right for terminated dealers. Usual standards of commerical reasonableness are not changed. For examples, where a dealer was terminated for poor credit, it may be reasonable for the seller to require c.o.d. for deliveries made pursuant to section 101(a)(6).

Changes in section 301 are technical provisions to make that section conform to the provisions applicable to dealers outlined previously herein.

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[1] NOMDA's proposed bill is printed above, as part of NOMDA's answer to Senator Kasten's question.

Question. I am curious about how the courts have treated the kinds of dealer-manufacturer disputes that NOMDA cites in supports of S. 286. Could you provide some examples of reported cases that address these issues?

Answer. As demonstrated during the Hearings held by the Consumer Subcommittee in regard to S. 286, the Office Machine and Equipment Dealers Act, this question neglects the fundamental problems between manufacturers and Dealers by focusing on the end result of a controversy between the two. The relationship between manufacturers and Dealers is currently extremely unbalanced in favor of the manufacturer. Contracts are presented on a "take it or leave it" basis, affording the Dealer no chance to negotiate fair and reasonable clauses for his own welfare and legal interests. Thus, in most contracts, in order to merchandise the line, a Dealer is forced to waive his normal contractual rights both under common law and the Uniform Commercial Code. The basic purpose of S. 286 is not to create a federal right of action, but rather to bring good faith to all phases of the contractual relationship. Under S. 286, a Dealer will now be in a position of equality with a supplier, and thus negotiate contractual provisions which will serve the asset he is developing for himself and the manufacturer.

Clearly, where a Dealer has waived his rights by contract it is difficult to pursue those rights in a court of law. As has been testified to, competent counsel has repeatedly advised clients not to litigate, since the potential for success is remote and the cost of litigation is significant.

However, there have been cases where the conduct of a manufacturer is so oppressive that legal action was pursued under a theory that the contract was one of adhesion and entered into through a manufacturer's fraud and thus, should be interpreted against the manufacturer. The best example of such a mater is *P&S Business Machines* v. *Olympia, U.S.A.*, F.2d 1321 (1983). Here, Mr. Phillips brought an action against Olympia only to receive a jury verdict in his favor which subsequently was overruled by the Court. Had S. 286 been law, Mr. Phillips would have prevailed, in that clear guidelines would be in existence to have supported the jury's conclusion. Unfortunately, Mr. Phillips has been forced to pursue two trials and one appeal for the privilege of litigating the matter a third time. This incredible waste of judicial time is a result of the absence of clear cut standards to judge a manufacturer's conduct. S. 286 would provide guidelines for the evaluation of conduct and more importantly, provide all parties with standards by which they should conduct themselves.

Currently, manufacturers in their contracts provide that the written agreement is the sole and exclusive understanding of the parties. Such provisions are commonly referred to as "merger clauses". Through these provisions manufacturers remove the oral promises and assurances made to dealers in persuading them to take on the product line. This lack of good faith will be eliminated through the passage of S. 286. It is impossible for the National Office Machine Dealers Association to determine the total number of abuses which were not litigated due to one-sided contracts, which competent counsel advised would preclude recovery. It is possible to advise of the hundreds of complaints received by the Association's Manufacturer/Dealer Relations Committee and Staff Attorney regarding the lack of good faith of manufacturers in their relations with Dealers. S. 286 is necessary because Dealers are burdened with unfair contracts which preclude them from obtaining redress for wrongs committed. This question focuses on a remedy which does not now exist instead of the problem which is now real—unfair contracts.

Questions of Senator Gorton and the Answers Thereto

Question. Has any state court, other than in Louisiana, held specifically that the Uniform Commercial Code, as adopted by the State, was inapplicable to a dispute between a manufacturer and dealer? If so, set forth the facts of the case, the case citation, and provide a copy of the court's opinion, or a transcript thereof.

Answer. *Lorenz Supply Co.* v. *American Standard, Inc.*, 30 UCC Rep. 810, 100 Mich. App. 600 (1980) (Is an oral distributorship agreement a contract for the sale of goods governed by the UCC? Held: The agreement was an ongoing economic relationship between Lorenz and the defendant for their mutual benefit rather than a contract of sale. Therefore, the trial court correctly ruled that the UCC did not apply.)

Question. For any case identified in answer to question No. 1, above, did the court make any finding regarding the applicability of State common law? Have there been any cases in which a State court has found the Uniform Commercial Code to be inapplicable but the common law of the State to be applicable to a dispute be-

tween a manufacturer and a dealer? If so, set forth the facts of the case, the case citation, and provide a copy of the court's opinion, or a transcript thereof.

Answer. As demonstrated during the hearings held by the Consumer Subcommittee in regard to S. 286, the Office machine and Equipment Dealers Act, this question neglects the fundamental problems between manufacturers and Dealers by focusing on the end result of a controversy between the two. The relationship between manufacturers and Dealers is currently extremely unbalanced in favor of the manufacturer. Contracts are presented on a "take it or leave it" basis, affording the Dealer no chance to negotiate fair any reasonable clauses for his own welfare and legal interests. Thus, in most contracts, in order to merchandise the line, a Dealer is forced to waive his normal contractual Code. The basic purpose of S. 286 is not to create a federal right of action, but rather to bring good faith to all phases of the contractual relationship. Under S. 286, a Dealer will now be in a position of equality with a supplier, and thus negotiate contractual provisions which will serve the asset he is developing for himself and the manufacturer.

Clearly, where a Dealer has waived his rights by contract it is difficult to pursue those rights in a court of law. As has been testified to, competent counsel has repeatedly advised clients not to litigate, since the potential for success is remote and the cost of litigation is significant. However, there have been cases where the conduct of a manufacturer is so oppressive that legal action was pursued under a theory that the contract was one of adhesion and entered into through a manufacturer's fraud and thus, should be interpreted against the manufacturer's fraud and thus, should be interpreted against the manufacturer. The best example of such a matter is *P&S Business Machines* v. *Olympia, U.S.A.*, 707 F. 2d 1321 (1983). Here, Mr. Phillips brought an action against Olympia only to receive a jury verdict in his favor which subsequently was overruled by the Court. Had S. 286 been law, Mr. Phillips would have prevailed, in that clear guidelines would be in existence to have supported the jury's conclusion. Unfortunately, Mr. Phillips has been forced to pursue two trials and one appeal for the privilege of litigating the matter a third time. This incredible waste of judicial time is a result of the absence of clear cut standards to judge a manufacturer's conduct. S. 286 would provide guidelines for the evaluation of conduct and more importantly, provide all parties with standards by which they should conduct themselves.

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Question. In what way(s) is the relationship between a manufacturer of office machine equipment and a dealer fundamentally different from the relationship between a manufacturer of any other product and an independent dealer of such products?

Answer. The business equipment and systems industry is a highly technological, service intensive industry. Unlike many industries, our end-user or customer is typically a commercial business. This commercial business buys the dealer's product to increase productivity and/or reduce operating expense.

A return on investment is the underlying motivation for this customer to do business with the dealer. The products covered under S. 286 are those designed primarily for use in an office environment.

The warranty on the products covered under this agreement are passed on to the dealer rather than the end-user. This warranty which is passed on to the dealer is not without cost. In accepting the terms of the 90-day warranty, which is a typical length of warranty in our industry, the dealer will waive many of the rights available to him under existing law.

Most of the equipment sold in our industry is transferred to the customer either through a month-to-month rental or some type of third party installment sale or lease financing The majority of the equipment I sell to my customer is financed on a "with recourse" basis.

If I am unable to provide service to that customer or keep the equipment operational because of lack of parts, etc., the customer will stop paying for the equipment.

Since I have sold the equipment on a "with recourse" basis, I am liable for the monthly payments should the lessee (customer) default. To compound and complicate matters further, the vast majority of the contracts which I now hold with manufacturers are on a short term basis. Typically, the manufacturer/dealer agreement is a 12-month term contract; however, in order to be competitive, most of the equipment which is leased by my firm is leased on a 60-month basis.

In addition, the dealer has a moral obligation as a member of that community to provide his customer with uninterrupted service at a fair price. All in all, the responsibilities that are either passed on or assumed by the dealer, are many.

The dealer is forced to "play ball" in order to make certain his customer, the end-user, receives an uninterrupted supply of product, service parts, and consumable supplies for the smooth and efficient operation of the end-users business.

The Consumer Subcommittee has received testimony regarding the one-sided, arbitrary contracts that dealers must sign to insure customer satisfaction.

Because financing is such a big part of our industry and an integral part of placing the equipment, it is imperative the end-user, as well as the dealer, have an assurance that continuity and continued source of supplies and parts will be available. S. 286 addresses this need.

Question. Has the legislature of any state acted to correct the problems cited by dealers in support of S. 286? If so, please identify the state and attach a copy of any legislation dealing with this issue.

Answer. The States of Hawaii and Wisconsin have enacted legislation similar to S. 286. [Copies are attached] [1]

Question. Has NOMDA actively lobbied any state legislatures on this issue? If so, please identify the state.

Answer. The National Office Machine Dealers Association is made up of over 70 local associations. The Hawaii Office Machine Dealers Association is one of these locals, HOMDA, was the driving force behine the successful passage of the Hawaii state bill, which is similar to S. 286 now before your committee.

NOMDA believes the problems that S. 286 addresses are nationwide in scope. Passage of legislation on a state-by-state basis is an alternative to S. 286, but would create a tremendous burden on the manufacturers. As you might imagine, a dealer agreement written to comply with the law as it exists in the State of Nebraska, may not comply with the law passed in the State of California.

The problems S. 286 addresses are nationwide in scope and, thus, we are requesting once and for all, federal legislation to deal with the unbalanced manufacturer/dealer relationship.

In reading the bill you will find it a reasonable piece of legislation. Ultimately, the end-user will be best served when the manufacturer and the dealer mutually agree to treat each other fairly and equitably in negotiating the terms of the dealer agreement, in fulfilling the terms of the dealer agreement, and finally, if necessary, in the termination of the agreement.

It is reasonable that end-users should be assured of continuity in the availability of parts and service. S. 286, with NOMDA's proposed additions, will do just that. Passage of S. 286 will provide end-user satisfaction.

Congress has shown in the past that unique problems deserve unique solutions. Other industries that have manufacturer/dealer relationships also have unique situations. Congress has in the past responded with specific legislation to address the unique problems encountered in those industries.

Two specific examples are the AUTOMOBILE DEALERS DAY IN COURT ACT and the SOFT DRINK BOTTLERS ACT. Both pieces of legislation were designed and enacted into law to resolve specific dealer/manufacturer situations which were unique to their industries.

Question. If, as Mr. Goldberg asserts, those manufacturers who have used the Model Dealer Agreement find it to be to their advantage, will not normal market forces be sufficient to insure its wide acceptance among manufacturers? If not, why not?

Answer. As of this date, approximately 40 of the 400+ manufacturers in our industry have adopted and are issuing the NOMDA Model Dealer Agreement. Because the overwhelming majority of the manufacturers offer a non-negotiable, one-sided (in favor of the manufacturer) dealer agreement, normal market forces are not suffi-

[1] These attachments have been retained in committee files.

cient. Unfortunately, they fail to insure the issuance of less than a fair and equitable dealer agreement.

NOMDA has been negotiating with manufacturers for the past decade r commending that manufacturers adopt and issue a NOMDA Model Dealer Agreement. The NOMDA Model Dealer Agreement includes four basic tenants as follows:

(a) The manufacturer and dealer treat each other in a fair, equitable, and ethical manner.

(b) Quotas or annual purchase budgets be mutually agreed upon.

(c) The contract be open-ended. If the dealer pays his bills and meets his quotas, he will continue to be the dealer for that manufacturer.

(d) If a dispute arises between the manufacturer and the dealer, the dispute can be settled by inexpensive arbitration.

Any additional protections the manufacturers wish to build into a dealer agreement are more than acceptable to NOMDA and to the dealers we represent. The primary reason for this lack of acceptance is the overwhelming bargaining position the manufacturer presently holds over the dealer. S. 286 is needed to resolve this inbalance in the business equipment and systems industry, and sustain the dealer from extinction.

Senator KASTEN. Our next panel will include Mr. Lautenbach, Mr. McArthur, Mr. Pratt, Mr. Nichols, and Mr. Eizenstat.

The first witness will be Mr. Stuart Eizenstat, Powell, Goldstein, Frazer & Murphy, Washington, D.C.

Mr. Eizenstat.

STATEMENTS OF STUART EIZENSTAT, COUNSEL, ACCOMPANIED BY A. G. W. BIDDLE, PRESIDENT, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION; ALLEN R. FERGUSON, CHAIRMAN, NATIONAL INSTITUTE OF ECONOMICS AND LAW; NEIL KUENN, COUNSEL, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS; THOMAS A. FINN, OFFICE EQUIPMENT DEALER; TERRY LAUTENBACH, VICE PRESIDENT, IBM CORP.; D. W. McARTHUR, VICE PRESIDENT, 3M CO.; TOM PRATT, VICE PRESIDENT, HERMAN MILLER, INC.; AND ROBERT NICHOLS, COUNSEL, CONSUMERS UNION

Mr. EIZENSTAT. Mr. Chairman, Senator Exon, I am Stuart Eizenstat, counsel for the Coalition for Competition, and I appreciate the opportunity to present our coalition's strongly felt opposition to S. 286 on behalf of every segment of the manufacturing and distribution chain.

Our coalition is a broad alliance of 19 American-based national organizations representing large and small manufacturers, hi-tech companies, wholesalers and distributors, retailers, as well as consumer and public interest groups.

This diverse group has come together because of our grave concern that the bill will have an adverse effect on what is now a competitive, vibrant and healthy office products market and will establish a grave precedent for Federal intervention in other sectors of the economy now governed by free market forces and the law of contracts.

Opposition to this bill is not limited to our coalition. A broad array of many of the Nation's leading economists of widely differing philosophies oppose the bill, as indicated by the statement attached to my written testimony.

Moreover, the Department of Justice, the Federal Trade Commission, the Government's own small business champion, the Chief Counsel for Adequacy of the SBA, also oppose the bill, as does an organization representing dealers, the National Office Products As-

sociation, which can speak for themselves rather than through NOMDA.

Following me will be four individuals who will demonstrate the breadth of concern that S. 286 has provoked. Robert Nichols of Consumers Union will explain the threats to consumers in this bill. Terry Lautenbach, vice president of IBM, will explain the bill's threat to competition and its discouragement to suppliers in using dealers; Thomas C. Pratt, vice president of Herman Miller, Inc. will explain the obstacles the bill presents to growing suppliers; Donald "Scotty" McArthur, vice president of 3M Corp., will talk about the bright prospects for growth in the existing office equipment market.

We have other witnesses available who will be unable to testify only because of the demands of the committee's time, but who by their presence today join the growing opposition to this bill. They are Jack Biddle, the president of Computer & Communications Industry Association, which represents scores of small computer and software manufacturers; Neil Kuenn, counsel to the National Association of Wholesaler-Distributors; Thomas A. Finn, an office equipment dealer from Leesburg, Va; and Dr. Allen Ferguson, chairman of the National Institute of Economics and Law.

The very identity of these interests opposing the bill refutes a major theme proponents have repeatedly and incorrectly made. This is not an anti-Japanese bill. The Dealers' Act would harm Americans, American manufacturers and suppliers who have major market shares in every one of the sophisticated products covered by the bill. American dealers seeking to enter what would be a locked-in market, American businesses and individual consumers who will have to bear the additional costs which inevitably will be passed down to them if this bill passes.

I will now summarize the coalition's reasons for opposing the bill.

First, the bill is antismall business and would damage one of the leading sectors of our economy—hi-tech companies. It erects new entry barriers, increases the costs of distribution, would encourage suppliers to use large existing dealers or open their own outlets, and imposes very real recordkeeping and legal burdens—all to the great disadvantage of small suppliers and small and new dealers.

The bill adds rigidities to a market burgeoning with new firms to market the products—an industry which we should be encouraging, not discouraging. Indeed, many of the dealers in this industry are larger than the suppliers, and the vast majority of suppliers covered by this bill are small businesses, not large.

Second, this bill is highly anticompetitive, and it would reverse the trend this very Senate committee has created to remove excessive Federal intervention. For manufacturers it is anticompetitive because it locks them into dealer agreements, makes it more difficult for them to market their products with the most efficient dealer, and encourages vertical integration and indeed the use of direct outlets rather than dealers, since marketing through dealers will become a legal minefield and administrative nightmare.

For new dealers entry barriers are created, and suppliers will have difficulty shifting their products to them. And uniform retail pricing is encouraged by the bill's $100 provision.

Third, the bill creates enormous practical problems to manufacturers and suppliers and new burdens for the overloaded courts. Suppliers cannot know under this bill when it is legal to terminate a dealer or fail to renew a dealership agreement for nonperformance and nonpayment of bills.

Suppliers will forever act with a cloud of noncompliance, and the sweeping and vague terms of the statute will lead to endless litigation and will require Federal judges to decide commercial disputes now handled either by negotiation or by State courts under perfectly adequate State law.

Fourth, the bill is utterly unnecessary. As the Justice Department noted, there is nothing unique about this particular competitive unconcentrated equipment market to warrant this extraordinary intervention. Dealers have substantial leverage with the hundreds of manufacturers in this industry and indeed more than in many other markets.

If Senator Exon is correct and if the previous witnesses are correct that the sales are due not to brand names but because of the reputation of dealers, then indeed those dealers have real market power and this bill is utterly unnecessary.

In fact, NOMDA's own counsel, Mr. Goldberg, in his own recent newsletter on behalf of NOMDA, spoke glowingly of the many opportunities open to dealers with all the new computer entrants and changes in distribution of traditional product lines.

He recounted in his newsletter that most manufacturers had learned the lessons of the 1970's which bred many other problems which we have heard today, and described the wide choices open to them and identified the numerous manufacturers operating under NOMDA-approved agreements in today's free market, showing the lack of need for the bill.

He admits in that newsletter that the laws and the market of change are creating significant new opportunities.

Senator KASTEN. Mr. Eizenstat, I am going to have to ask that you summarize your statement.

Mr. EIZENSTAT. I will.

My last point, Mr. Chairman, is that this is classic special interest legislation. There are never-ending modifications, including those today, which simply do not change the fact that all of the benefits are conferred on existing dealers and all of the burdens on everyone else.

The bill proceeds from a false premise. There is no war out there between suppliers and dealers. Suppliers have, Mr. Chairman, a direct financial interest in a reliable, longstanding dealer network and in the success of their dealers. They spend much time and effort to make that success. A termination is a failure for suppliers as well as dealers.

For these reasons we believe that the bill should not be passed.

[The statement follows:]

STATEMENT OF STUART E. EIZENSTAT ON BEHALF OF THE COALITION FOR COMPETITION

I am Stuart E. Eizenstat, counsel for the Coalition for Competition. On behalf of the Coalition and its members, I wish to thank you and your collegues, Mr. Chairman, for providing this opportunity for the broad array of interests represented

here to present their views on S. 286, the proposed Office Machine and Equipment Dealers Act.

SUMMARY AND BACKGROUND

The Coalition strongly opposes S. 286, on several grounds:

The bill is classic special interest legislation. It is designed to confer unique and unprecedented advantages on a narrow industry segment—certain existing office machine dealers. It will harm all other affected interests—consumers, manufacturers, wholesalers, and new or growing smaller dealers eager to compete in what is now a free, unregulated, health and dynamic market.

The bill is highly anti-competitive for suppliers, new dealers and consumers.

It places unique burdens on one of the most promising sectors of our nation's economy—high technology office products. Moreover, the burdens fall with particular severity on emerging, smaller high technology manufactuers. If anything, the Federal government should be helping these entrepreneurs, not hurting them.

This is an anti-small business bill, as indicated by the strong opposition of the Small Business Administration's Chief Counsel for Advocacy. There will be far more losers than winners if this bill were to pass, but the biggest losers would be the small businesses affected by its—small manufacturers and suppliers who would have to bear additional costs to enter the market and distribute their products, and small dealers wishing to expand in or enter a locked-in market.

The bill is totally unnecessary. There is nothing unique about the un-concentrated, competitive office products market to warrant the extraodinary brand of federal intervention reflected in the provisions of S. 286. Nor is there any reason to doubt that the remedies applicable elsewhere are completely adequate here—remedies such as the Uniform Commerical Code, Federal and State antitrust laws, and other statutory and common law contractual and consumer rights.

Finally, the sweeping and vague provisions of the bill threaten to flood the Federal courts with additional litigation over routine commenrical disputes that should be left where they are now—to private negotiations and state court actions.

The coalition for Competition is a broad-based alliance of large and small retailers, wholesalers, distributors, and manufacturers, and consumer and public interest groups. they are united out of concern not only with the pernicious impact this bill would have on a healthy office products market, but with the precedent it would establish. If this group of special pleaders can win relief from the Congress, one can be sure that others will follow, seeking shelter from the effects of free competition. The Coalition is comprised of nineteen organziations representing more than 1 million individual companies. A complete list of the members of the Coalition is appended to my statement.

In addition, there are important sources of opposition to S. 286 that are not formal members of the Coalition. For example, a unanimous Federal Trade Commission, the Department of Justice on behalf of the Reagan Administration, and the Chief Counsel for Advocacy of the Small Business Administration have all proclaimed their opposition to the bill in strong written statements. Indeed, even the National Office Products Association, a major business association representing the interests of office equipment dealers, has opposed the bill, recognizing that it would hurt rather than help office equipment dealers.

I would like to add a personal note at the outset, Mr. Chairman. This proposed Dealers Act runs directly counter to one of the most beneficial currents in public policy in our country. I refer to the bipartisan movement, spanning the last three administrations and broadly popular in the Congress and among the electorate, to eliminate wasteful Federal regulatory protections for narrow interests like the intended beneficiaries of this bill. The Senate Committee on Commerce, Science, and Transportation has played a major leadership role in this movement, with the landmark deregulation laws in airlines, trucking, rail, communications, and other initiatives. In contrast, the Dealers Act would be a step backwards on the route to getting the government out of those areas of the economy where it does no belong.

At the moment, there is growing interest in establishing an effective industrial policy to help American industry regain its leadership position in world markets. But this bill turns sound industrial policy on its head. Industrial policy aims at enhancing productivity and efficiency, and at spurring development in the more progressive sectors, that offer the best prospects for establishing world leadership in the United States. This bill represents government intervention that raises costs, adds inefficiencies, and builds in rigidity that will hamper one of the most exciting potential sources of American economic power and innovation—the high technology office products sector.

Following me on this panel will be four distinguished individuals whom I would like to introduce to the Subcommittee. To identify them and the organizations they respresent indicates the breadth of concern that S. 286 has provoked, and underscores the inherent faults of this type of narrow-based legislation.

Robert Nichols, of Consumers Union, will explain why consumer interests are threatened by this bill and will also elaborate on some of its multiple anticompetitive impacts.

Terry Lautenbach, Vice President of International Business Machines Corporation, will explain why this bill presents serious problems from the perspective of American office equipment manufacturers such as IBM.

Thomas C. Pratt, Group Vice President/Sales and Marketing of Herman Miller, Inc. of Zeeland, Michigan, will testify on behalf of the Business and Industrial Furniture Manufacturers Association. He will explain difficulties presented by the bill to the members of that organization, and to vigorous and growing supplier enterprises like Herman Miller.

Donald W. McArthur, Vice President of the Information Systems Group at 3M Company, who will testify about the prospects for expansion of the office products market and about likely effects of S. 286 in light of 3M Company's 30 years of experience in this market.

Moreover, had the Subcommittee's time permitted, there are numerous other persons who would have testified against this bill, representing every link in the distribution chain for office equipment, from manufacturers to suppliers to dealers.

In addition, as indicated by the attached statement, many of the most distinguished economists in the country have strongly opposed the bill, including such diverse figures as Walter Heller, Kenneth Arrow, Frederic Scherer, Hendrick Houthakker, and William Baumol.

One additional point is reflected by the nature of this panel. The identity of these panel members refutes the major theme used to promote this bill by its proponents. This is not an anti-Japanese bill. This Dealers Act would result in serious harm to the interests of Americans—American businesses, American consumers, American productivity, efficiency, and competitiveness.

Recently, proponents appear to be trying to switch from their original and transparently false anti-Japanese theme to portraying the bill as a pro-small business measure. The new line is just as erroneous as the old one.

That is why the Chief Counsel for Advocacy of the Small Business Administration opposes S. 286. As he stated in a July 21, 1983 letter to Representative Norman Lent, "Legislating exclusionary market power to this group [existing dealers] at the expense of all potential entrants is poor competition policy, because *it denies small businesses the ability to grow and expand in this competitive market.*" (Emphasis added.)

THE ONE-SIDED SPECIAL INTEREST PROVISIONS OF S. 286

Members of this panel and the individuals and businesses they represent oppose this bill because it is bad public policy to adopt legislation like this, which confers a privileged position in the market-place on one segment at the expense of all others. The bill is totally one-sided. Its obligations are all imposed on suppliers and the benefits on existing dealers. Let me summarize here the precise ways in which S. 286 carries out its preferential design:

The bill forbids suppliers from terminating agreements before the end of the contract term (if there is one), unless the supplier is willing to risk litigation or pay the dealer off with a settlement that must include an amount for "good will"—a vague and potentially onerous requirement imposed by no other statute on no other industry. A supplier may not terminate a dealer agreement unless notice is given in writing at leat sixty days prior to termination and the dealer is offered compensation, including "a reasonable amount for goodwill".

Even at the end of a contract term, the bill greatly complicates sound business decision-making for a supplier dissatisfied with the performance of a dealer. The bill provides that a supplier (not a dealer) must act in "good faith" in "refusing to renew" a dealer agreement. The bill then sets out its own unique, sweeping definition of "good faith," a novel definition completely different from that of the common law and the Uniform Commercial Code. It appears that this definition could bar a supplier from simply ending a relationship at the end of a contract term, but might impose some sort of a duty to bargain with the dealers over the question and terms of renewal—in "good faith," whatever that would mean. Again, this new federal "good faith" obligation is completely one-sided. As the Department of Justice noted in its letters of August 8, 1983, to Chairman Peter W. Rodino, Jr. of

the House Judiciary Committee and to Chairman James J. Florio of the Subcommittee on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, "[N]o corresponding obligation of good faith is imposed on the dealer." The Justice Department further noted that if a supplier terminated a dealer for cause, it "could still be liable for failure to use 'good faith' in the termination."

In effect, the bill creates contracts in perpetuity for the sole benefit, and at the option of, existing office machine dealers, except when the supplier is willing either to litigate or to pay off the dealer to end an unsatisfactory relationship.

In addition to these "lock-in" provisions, the Dealers Act arms office equipment dealers with other unique and unprecedented legal advantages that would enable them to threaten suppliers with limitless disruption, inefficiency, and expense. In particular:

The bill requires a supplier to furnish a dealer with "any" product it manufacturers or supplies, regardless of whether it makes business sense to distribute a particular product to that dealer. Indeed, it would even require suppliers to furnish existing dealers with future products not yet available. Under this provision, for example, a small store selling IBM typewritters could demand that IBM furnish it with a large and sophisticated computer that the dealer had no capacity to service properly. In other words, the bill puts individual dealers in a position to dictate to suppliers what the suppliers' distributional and marketing strategies shall be.

The bill requires suppliers to furnish their products to dealers on a "timely basis" or be in violation. Yet this is often beyond the control of suppliers dependent on subcontractors who manufacture component parts or whose products might be in short supply due to market demand elsewhere.

The sweeping and unprecedented definition of "good faith," which suppliers (not dealers) are obligated to observe, applies to all phases of relations with dealers, regardless of how tentative or preliminary, *i.e.*, to "presenting, describing, or negotiating the terms of provisions of the dealer agreement," to "performing or complying with" the agreement, and to "terminating, cancelling, or refusing to renew" the agreement. This feature puts a complex and unpredictable legal component into every business decision in every phase and aspect of a supplier's relationship with a dealer. Marketing through an independent retail dealer becomes a never-ending legal minefield.

The bill prohibits waiving any of its terms by contractual agreement, even if both parties wish to do so. This has a vast potential for mischief. For example: The bill provides that termination of a dealer agreement before its term is up may occur only with sixty written days notice and an offer of compensation including "good will," or unless the supplier can show that termination is for "just, good, or significant cause." The anti-waiver requirement could preclude the parties from agreeing to any criteria or procedures for termination other than those specified in the bill. This could well mean that no contract may provide that termination shall be a supplier's remedy for the dealer's breach of the dealer agreement, or of any of its specific provisions. Suppliers would not know when it was appropriate to terminate dealers for such standard problems as poor performance or non-payment of bills—virtually the only reasons dealers would be terminated.

The bill applies to "oral" agreements. Read together with the anti-waiver provision, that could negate any contractual language prescribing that the whole of the understanding between the parties is embodied in the document itself. This, therefore, goes far beyond the Uniform Commercial Code, which does not cover oral agreements, all for the benefit of one narrow segment of one industry.

In other words, the anti-waiver, "oral agreement" and "good faith" provisions of the bill mean, in effect, that suppliers will not be able to rely upon their written agreements with dealers to define the terms of their relationships.

In practice, the terms will depend on how aggressive an individual dealer is at exploiting the vague and sweeping terms of the Act. Suppliers will never be certain that a dealer will not repudiate the agreement, or one of its provisions, by claiming as authority an alleged side oral agreement, or by asserting that he accepted the inconvenient contract provision because he felt "intimidated" or "coerced" in violation of the "good faith" requirement of the Act.

All of these novel, burdensome, and one-sided provisions are enforceable by a new Federal cause of action for "damages, injunctive relief, or other equitable relief. . . ." The prevailing party in these actions may be awarded costs, including attorneys fees.

The one-sided nature of this bill is dramatized by the fact that its provisions apply all their burdens on suppliers and manufacturers, with no responsibilities or obligations imposed on the dealers promoting this bill.

THE MULTIPLE ANTICOMPETITIVE EFFECTS OF S. 286

From this summary of the Dealers Act it is easy to discern its profoundly anti-competitive character. This massive set of problems has led Federal antitrust authorities from the Federal Trade Commission to the Department of Justice to oppose the bill as anti-competitive in very strong terms. I will summarize the major anti-competitive problems generated by the bill, while leaving more detailed treatment to other panel members with economics and business expertise and experience, and to the Federal Trade Commission, and Assistant Attorney General Baxter.

First, as the Federal Trade Commission unanimously concluded, speaking on behalf of every Commissioner, the bill "would create significant barriers to entry where few now exist." These barriers would appear at both the manufacturing and the retail levels.

At the retail level, formidable entry barriers are imposed by the bill in the path of new entrants or of aggressive smaller dealers seeking to attract business away from existing dealers. With the expense, hassle, and litigation delays that will become necessarily incident to any supplier's decision to change dealer outlets, the chances of new or smaller dealers breaking into existing markets will be radically diminished by the bill. New dealers will be very hesitant to enter a market with locked-in arrangements between existing dealers and all suppliers. Of course, that is precisely the objective of its proponents—the existing dealers who want to diminish competition within their industry—something this bill unfortunately, would accomplish very effectively.

Moreover, even if they wish to, in order to attract business, new entrants into the dealer market cannot waive the provisions of this bill to gain a competitive advantage over existing dealers.

At the manufacturing level, the bill will also make it more difficult for new entrepreneurs to enter the field. For them, unlike their larger and established competitors, establishing their own outlets is not an option. Hence, they will have no way of avoiding the added costs imposed by the bill. And, moreover, the costs the bill adds will have for more dramatic implications for them in many cases than for their larger competitors. Threats of litigation will be more menacing in their implications, and aggressive interpretations of the law will be more difficult for them to refute.

Second, the bill actually requires suppliers—both manufacturers and wholesalers—to become intimately involved with the pricing practices and decisions of their dealers, and creates possible pressures toward uniform retail pricing. This perverse result flows from the fact that the bill only applies to products that retail for $100 or more. Of course, it is retailers now who set such prices—prices which, it should be added, are very volatile because of the intensity of competition and the pace of innovation in this market.

To add to this problem, suppliers will be required to shoulder enormous additional recordkeeping burdens, since they otherwise will be unable to determine if their products are covered by the bill or not.

Third, the bill creates significant artificial incentives for concentration—both vertical and horizontal. Vertical integration is highly likely to result by manufacturers and suppliers financially able to do so, since integrating forward into ownership of distribution outlets is the only way to avoid the burdens of the bill.

Moreover, in order to spread the various costs generated by the new legal complexities of distribution, smaller manufacturing firms will be spurred to combine horizontally to market their products, even though no dramatic economies at the manufacturing level itself might be realizable from such a combination.

Even smaller dealers could be driven to merge or find themselves at a competitive disadvantage. As the Department of Justice has stated: "[a] reaction by suppliers to the bill's restrictions could be the use of only large, established dealers. . . . [S]uppliers, rather than confront the possibility of law suits from numerous dealers, may desire to do business with a few large dealers and develop loyalty from those dealers in return for exclusive territories."

Fourth, the bill rewards the inefficient and penalizes the successful. The mandatory compensation provision will tend to give the highest awards to inefficient dealers with low reputations. When such a dealer is terminated by one manufacturer it will have a much easier time than a competent dealer would to show damage from the termination, since it will have more trouble replacing the lost business.

Conversely, the mandatory goodwill formula will also threaten the most respected American suppliers with the highest damages, since disgruntled dealers will be able to show the most damaging loss of "goodwill" from a loss of such a supplier's business. Perversely, the American manufacturers and suppliers who provide the great-

est amount of "goodwill" to dealers by virtue of their own reputations will have the largest compensation to pay terminated dealers to avoid endless litigation.

A REAL THREAT TO SMALL HIGH TECHNOLOGY AMERICAN ENTREPRENEURS AND A DANGER TO SMALL BUSINESS

A final irony concerning the anticompetitive implications of the bill is that the main brunt of these burdens would fall on a group of American enterprises which, if anything, Federal policy should foster, not hamper.

The interests certain to be most directly disadvantaged by the Dealers Act are comparatively small, newly emerging U.S. manufacturers in the high technology office products field. Small Business Administration Chief Counsel for Advocacy, Frank S. Swain, stated concisely, that "the bill would restrict the increasingly abundant business opportunities available as a result of the technological advancements in the office equipment market". The reasons for this conclusion are clear. Such concerns must depend on retail dealers to distribute their products. They cannot avoid the bill and its cost by integrating forward to set up their own outlets. They have much greater difficulty shouldering the cost of fully analyzing the complexities of the bill, keeping tabs on the price of the products at the retail level and on changing precedents in the Federal courts, bearing the risk of paying attorney's fees, and generally integrating all the changing rules into their marketing plans and dealer relationships. New small firms are far more vulnerable than their established competitors to attempts by aggressive dealers to exploit the numerous legal pressure points they are given by the bill.

In sum, the Dealers Act will block the path of new entrepreneurs in this field both with significant barriers to entry and even more severe competitive disadvantages.

This threat is real. Its gravity is evidenced by the March 9, 1983 letter signed by all members of the Massachusetts delegation, including Speaker of the House O'Neill and both Senators, to Chairman John Dingell of the House Energy and Commerce Committee, urging rejection of the bill because of the harm it would do to the high technology firms that have done so much for the economy of that state. The delegation stated: "What these firms deserve is our strong support, not additional legislative and regulatory hurdles for them to overcome."

In short the bill would particularly hurt small businesses in this industry. Small suppliers would face a market with fewer dealers from which to choose and higher costs in dealing with them to distribute their goods, costs they are comparatively less able to bear. They would be unable to afford the costs of "integrating forward" and establishing their own outlets to avoid the burdens imposed on them by this bill in distributing their products through dealers. They have fewer resources to cope with the legal and administrative burdens of the bill.

Small dealers would likewise be disadvantaged. Real entry barriers are created under this bill to help existing dealers keep out new small businesses from entering the dealer market, since the ability to offer shelf-space under more favorable terms is so limited under this bill. Existing dealers will already have a lock on the products of suppliers and manufacturers. Suppliers faced with this bill will be encouraged to try to get dealers to carry additional inventories, to use large established dealers, or to open their own outlets—all detrimental to small dealers.

As the Department of Justice has noted: "By raising a supplier's cost of dealing with small dealers in this manner, the bill not only will be detrimental to small dealers, but it also may deter suppliers from using numerous small dealers to market different lines of products even when that option is more efficient (from society's standpoint) than the use of a few, large dealers."

We agree, and we hope the Subcommittee will too.

THE BURDENS ON THE FEDERAL JUDICIARY THAT THE DEALERS ACT WILL GENERATE

Because so many of its key provisions are at once novel, broad, and vague, the Dealers Act will have many unforeseen effects. But the very indefiniteness of its terms makes one impact crystal-clear. Enactment of the bill will spawn a significant new legal specialty, lucrative no doubt for lawyers, but a severe burden on the already overburdened Federal courts. Reviewing the bill, one can readily note examples of the questions that will bedevil the courts for years:

Precisely how does the idiosyncratic definition of "good faith" in S. 286 differ from the traditional common law and UCC concept? Will suppliers be able to specify certain principles as prerequisities for entering into or renewing a dealer agreement, or will such a position constitute "intimidation" or "coercion" under the definition of "good faith" in the bill?

What products are covered by the loose definition of "office product?"

Who are "dealers"—who are "suppliers?"

To what extent and under what circumstances is "just, good, and significant cause" for termination the same as or consistent with breach of substantive contract provisions? When and to what extent is it different? Can breach of a contract provision ever be made ipso facto an express basis for termination?

To what extent do suppliers have obligations concerning "presenting, describing, or negotiating" contract proposals that go beyond current UCC or common law requirements? An identical question is posed regarding a suppliers's "refusal to renew" a contract that has expired.

What is the meaning of the "timely basis" on which suppliers must deliver any product demanded by a dealer? Are these any exceptions or qualifications to the draconian provision for delivery on demand of "any product?"

What kinds of contract provisions will be invalidated by the anti-waiver provision?

As to questions not directly resolved by express provisions of the bill, would state contract law apply to them? To some but not others? How would the lines be drawn?

Moreover, even the exceptions arbitrarily written into the bill to attempt to diminish opposition to the bill, will give rise to endless litigation. For example, "telecommunications equipment" is exempted, but much of the modern office equipment clearly covered by the bill includes facets which have telecommunications equipment incorporated into it. This bill is attempting to legislate in an industry rapidly changing, with the types of arbitrary distinctions which will be increasingly meaningless with the march of technology.

One can be confident that questions such as these, and myriad variations of them, will be litigaged, over and over again. Dealers will have substantial incentives to test the law. They can obtain "damages [including "goodwill"], injunctive or other equitable relief," and attorneys' fees if they prevail. The type of dealers who are being terminated by their suppliers will often find it worthwhile to sue.

The Federal courts generally do not become involved in the resolution of comparatively minor commercial disputes of the sort that will be generated by the Dealers Act. Indeed, many of these disputes are never resolved by any court. They are resolved by private, commercial negotiation—as they should be. Certainly it would be anomalous to carve out a new special corner of Federal contract law with its unique rules, applicable solely to a segment of this one industry. The one thing which can be said with complete certainty is that the bill creates tremendous incentives for the litigation of every termination.

THE DEALERS ACT IS UNNECESSARY

What need justifies S. 286 and the injuries it imposes on competition, on consumers, on suppliers of office products, on the Federal Judiciary, indeed on our system of commercial law? The answer clearly is—there is no need. The bill is quite unnecessary.

There is nothing unique about the office products sector that would begin to justify the extraordinary brand of protectionist intervention sought by the proponents of S. 286. If anything, office product dealers enjoy more leverage than many retailers in other sectors. In substantially all of the numerous product lines covered by the bill, they have a vast array of competing sellers from whom they can comparison shop. Competition is so great at the supplier level to obtain dealer shelf-space for their products that suppliers do not have untoward market power over dealers. A manufacturer or supplier with poor practices will end up hurting himself and his products in a competitive market place, and will lead dealers to drop his product and pick up a competitor.

But no charts or studies are really needed to underscore the substantial and mushrooming scale of competitiveness at the manufacturing end of the office products industry. A casual review of the dazzling variety of office product manufacturers advertising in any issue of Fortune or Forbes or Time or Newsweek, or of the many office product brand names displayed in shop windows on K Street in downtown Washington will make the point clearly.

The proponents of the Dealers Act point to anecdotes of alleged abuse of dealers. That is the approach they employed in the 97th Congress with the predecessor of S. 286, and it continues to be their only apparent type of claim in support of the bill, as demonstrated by their testimony before the House Subcommittee. But anecdotes are no basis for legislation. A few stories, gripping, cannot justify measures that disrupt an entire industry and harm the overwhelming majority of enterprises who

engage in perfectly fair and honest dealings. Every industry has some disputes between some of its suppliers and some of its retailers. This is what state courts and the UCC exist for, if the problems rise to the level of litigation.

To justify radical legislative action like this proposal, a showing must be made that there is a systematic problem here and that there is something grave about the economic or legal structure of this industry that justifies a brand of intervention no one has seen fit to enact anywhere else. No such showing has been made. There are no reasons to assume that freedon of contract and the ability to select alternative suppliers are less effective remedies here than anywhere else for such "abuses" as may occur.

As the Department of Justice has concluded: "We have no reason to believe that abrasive contractual practices occur in the office products industry to any greater extent than in other industries, or that suppliers in this industry have substantially greater bargaining power vis-a-vis their dealers than suppliers in other industries." The Department of Justice further concluded that the proponents of this bill, who seek such a "fundamental shift in the traditional relationship between state and federal government" must carry "a substantial burden to show that the legislation is necessary. The anecdotes that we have seen which purport to justify the bill simply are not sufficient to meet that burden."

Moreover, if market remedies are inadequate in a particular case, "existing law," as the Federal Trade Commission has concluded, "more than adquately protects dealers from such [unfair trade] practices." The Commission noted that a "plethora of legal protections" is available: Common law and the Uniform Comercial Code provide remedies for breach of contract and spell out the obligations of contracting parties, including a well defined and established requirement to deal in good faith. State law also provides remedies for business torts. Federal and state antitrust laws, with treble damages and attorneys' fee awards to prevailing parties, are an avenue for relief that is readily and frequently invoked by retailers.

Given this formidable array of legal protections already in place, there is no reason for still another layer for this one narrow industry segment. Significant awards have been given to dealers against certain suppliers under state law when a dubious practice occurs, as exemplified by the large 1983 jury verdict obtained by P&S Business Machines of Birmingham aganist Olympic, a manufacturer of office equipment.

MISCHARACTERIZATIONS OF THE BILL

If the Dealers Act threatens so many legitimate groups and interests, why has it received consideration in two Congresses? One reason may be that some observers have simply not been given a full picture of the nature of the bill and its effects. Its proponents have emphasized several arguments that distort or misrepresent the true character of the bill. I would like briefly to address these mischaracterizations.

First, one of the proponents' favorite themes is to insist that S. 286 is an anti-Japanese bill. But that is simply not the case. This is not an anti-Japanese measure, it is an anti-American bill. American manufacturers have major market shares in every single one of the numerous product lines covered by S. 286. American wholesalers and consumers will be harmed by the act. And smaller, aggressive American dealers intent on expanding their market share on entering the dealer market will find the Act a high barrier to realizing their hopes.

Second, the proponents picture this as a pro-small business, anti-big business bill. But this too is obviously wrong, as detailed above. S. 286 is bad for business of all sizes. Certainly, the bill is opposed by some very important large companies. But it is equally strongly opposed by myriad small and medium-sized companies and by business associations representing such small businesses at all levels of the office products market, and from other sectors. Indeed, as has been discussued, S. 286 is likely to cause greater damage to the interests of smaller manufacturers, wholesalers and dealers, than to large companies.

Third, the proponents have more recently claimed that the Office Machine Dealers Act is simply an analogue of the Automobile Dealers Day in Court Act. But this claim too has no basis. Neither the industries nor the bills themselves are remotely comparable. In 1956, when the Auto Dealers Day in Court Act was passed, the national automobile dealer market was completely dominated by three manufacturing firms. Individual automobile dealers represented one manufacturer and one manufacturer exclusively; each was totally dependent upon that manufacturer for spare parts, new cars, warranty payments—literally everything necessary for the conduct of his business. Those auto dealers could plausibly claim, that if they were dissatis-

fied with terms proposed by their sole suppliers, they had but two realistic options: either give in or go out of the automobile dealer business.

In contrast, the office machine market covered by the bill before the Subcommittee is among the most vigorous, competitive, and dynamic sectors in the nation's economy. Individual dealers typically carry several brands in all of the many product lines they handle. Dealers can add or switch brands easily. New suppliers are continuously entering the market. Manufacturers and wholesalers must compete to secure shelf-space for their products. Dealers have considerable leverage vis-a-vis their suppliers. Indeed, if one were looking for a market that closely resembles text book competitive models, it would be hard to find a better example than this one.

Moreover, the terms of the Office Machine Dealer bill differ sharply from those of the Auto Dealers Day in Court Act. For example, the Auto Dealers law has no requirement remotely comparable to the provision in S. 286 that suppliers must promptly deliver any product demanded by a dealer or to the provisions that termination can be secured only through compensation for lost "goodwill." Both The Auto Dealers Act and office machine dealers bill contain definitions of "good faith." But the definitions differ, and that in S. 286 is broader and potentially much more radical in its implications for undermining the fundamentals of freedom of contract. Moreover, the Auto Dealers Act has no contractual arbitration provisions, no anti-waiver provision, no "timely" delivery requirements, and does not cover oral agreements—all of which are provided in S. 286.

Another mischaracterization we have heard is that proponents of S. 286 have described it as necessary to relieve office machine dealers of unjust burdens they encounter in fulfilling their obligations to perform warranty repair work for their customers. It is very unclear what this alleged "problem"—if it exists—has to do with the alleged cure—S. 286. But certain points could be noted: First, certain products covered by S. 286, such as personal computers, are also "consumer products" under the Magnuson-Moss Warranty Act, passed in 1974. For all such products, suppliers are required by that Act to "make reasonable arrangements for compensation of" dealers for any required warranty work they do. With respect to office products not covered by Magnuson-Moss, my understanding is that it is general industry practice to employ practices consistent with that law—direct compensation for parts and either direct or indirect compensation for labor.

In any event, the fact that some dealers claim that they must shoulder excessive warranty burdens is just another example of the anecdotal approach to promoting this bill. It is no basis for sweeping, protectionist legislation that will disrupt an entire industry. If some individual dealers are dissatisfied with their suppliers' warranty arrangements, their best remedy is to negotiate a better arrangement, or find a more congenil supplier. No showing has been made as to why this option is less available in the office products industry than in any other industry.

Moreover, the alleged "abuses" to which proponents have, anecdotedly pointed have, upon examination almost invariably turn out not to be significant problems at all—certainly not ones which could be solved by S. 286.

For example, the problem most frequently alleged by proponents during the July 21, 1983 hearing before the House Subcommittee on Commerce, Transportation, and Tourism, was their contention that if a dealer is terminated, the dealer could frequently end up without replacement parts to service equipment already sold to customers.

This is not a justifiable concern: In those small minority of cases where a dealer is terminated, the common practices of the industry and the operations of the healthy and florishing office equipment market assures that this result will almost never occur.

Because suppliers face competitive pressures to attract and retain good dealers and to hold the customers purchasing their products, they are driven to assure that both dealers and customers are treated fairly on service and spare parts.

Individual company policies differ, but in one way or another, most and probably all suppliers assure replacement parts to terminated dealers for at least some period of time to service existing customers, at least if the termination did not occur because he dealer has persistently proven unable to pay its bills. Some companies provide spare parts for their office equipment to existing dealers, terminated dealers, repairmen, and others in the service and repair business, all at the same wholesale price: Thus, a terminated dealer in the equipment sold by the suppliers has no disadvantage in terms of spare parts and service.

In addition, a further feature of this dynamic market protects terminiated dealers. There is a vigorous, highly competitive, "aftermarket" in parts for many office products, distributed by third-party suppliers, such as Katun Catalog. These spare parts suppliers match and frequently undersell manufacturers' wholesale prices for

parts to dealers. A terminated dealer could often obtain spare parts from a company like Katun Catalog at a price lower than it could get from its original supplier.

Thus, the claim that terminated dealers cannnot get replacement parts—quite apart from the apparent fact that S. 286 offers no real remedy for the alleged problem—is just not a realistic problem at all upon which to premise legislation.

Finally, I wish to note one additional, important point. The proponents of S. 286 would have the Subcommittee imagine that relations between suppliers and dealers in office equipment amount to a commercial cold war, in which suppliers are constantly engaged in schemes to intimidate their dealers, in particular by threatening or actually terminating them. But to anyone who has been involved in this or any similar business, this adversarial picture is utterly distorted.

The truth is that supplier-dealer relations are precisely the opposite of this sort of zero-sum game. Only if a dealer is successful can the supplier be successful. The supplier's every incentive is to facilitate that success, to nurture long-standing, deep-rooted relationships with dealers who secure respect in their communities for themselves and the products of the supplier they sell and service.

A termination is a failure for all parties. It means that the supplier must start all over again to begin building a strong position in a given local area. It is an action of last resort, and almost never occurs except when a particular dealer cannot meet either its financial or performance obligations on a chronic basis. As the companies who will appear with me today will explain in more detail, every successful manufacturer must work hard to gain the allegiance of effective dealers. They must work hard with their dealers to facilitate mutual success in marketing and servicing products.

It is for this reason that termination occurs in such a small percentage of the dealings between suppliers and dealers—and then almost always only for the most substantial causes.

CONCLUSION

Precisely because the case for S. 286 is so thin, because its proponents' plea for Federal protection is so hollow, this bill is cause for alarm. If one segment of this most competitive and healthy sector can secure insulation from the challenges of the free market, or even appear to come close, the fact will not go unnoticed. Other interests will say, if the office machine dealers can do it, why can't we? There are bound to be many other groups that consider their plight at least equally sympathetic, or their political resources at least equally formidable.

Our nation has traditionally tended to turn aside such pleas for special protection, particularly with as little justification as exists here. But were this bill to pass, demands for intervention could become harder to resist as well as more plentiful.

The result could be a transformation of the landscape of our economy. We could see a balkanization of our commercial law into discrete preserves, each operating in accord with its own set of legal restrictions designed to freeze market shares and economic roles for the incumbents.

America has always been the land of opportunity—not the land of protection for the status quo. The Coalition for Competition wants to keep it that way.

We hope that the Subcommittee will see this issue in the same light and reject the Dealers Act.

[ATTACHMENTS]

COALITION FOR COMPETITION

The Coalition for Competition is an alliance of consumers, retailers, wholesaler-distributors, manufuacturers and small business groups which oppose S. 286 and H.R. 1159, the Office Machine and Equipment Dealers Act. The Coalition is comprised of nineteen organizations representing more than 1 million individual companies with aggregate annual sales of $1.5 trillion.

Association of Data Processing Service Organizations (ADAPSO) is the trade association for the computer services industry, representing more than 640 companies that market software products, processing services, microcomputer software, integrated systems and professional services. The computer services industry earned revenue of $26 billion in 1982.

American Electronics Association (AEA) represents over 2,000 member companies in 43 states, and over four hundred financial, legal and accounting organizations which participate as Associate Members. AEA encompasses all segments of the electronics industries including manufacturers and suppliers of computers and peripherals, telecommunications equipment, defense systems and products, instruments, se-

miconductors and other components, software, research, and office systems. The association combines a diversified program of industry services, financial conferences and management education with active grass roots government advocacy.

American Retail Federation (ARF) consists of 33 national retail trade associations, 50 state retail associations, the Greater Washington Board of Trade, as well as corporate members. Through its members, ARF represents more than a million retail establishments.

Association for Information and Image Management (AIIM) is the national organization representing manufacturers, dealers and users in the information and imaging industry. AIIM has 270 trade member companies and over 9,000 individual professional members.

Association of General Mechandise Chains (AGMC) represents 125 retail companies operating more than 20,000 discount, variety, dollar and family center stores. AGMC members range in size and include not only many of the nation's argest retail chains, but also companies active in one or more regions of the country or in a few localities. AGMC member company stores are found in every state of the nation and last year accounted for over $35 billion in sales.

Business and Institutional Furniture Manufacturers' Association (BIFMA) is a national trade association representing 150 individual companies in the business and institutional furniture industry. BIFMA's membership represents approximately 90 percent of the sales volume of this $4 billion industry.

Business Records Manufacturers Association (BRMA) is a national association comprised of 18 manufacturers of business records storage devices. BRMA's members operate plants in 14 states and have annual sales in excess of $500 million.

Computer and Business Equipment Manufacturers Association (CBEMA) represents 41 companies accounting for 85 percent of the sales volume of computers and business equipment produced in the United States. During 1981, CBEMA member companies had revenues in excess of $50 billion, employed 750,000 workers in the United States, and had a trade surplus of $7 billion.

Computer and Communications Industry Association (CCIA) is a trade association representing computer and peripheral product manufacturers, data communications equipment and service providers and leading software firms. The seventy-one member companies of CCIA have combined annual revenues of approximately $5 billion and in excess of 100,000 domestic employees.

Consumer Federation of America is the largest consumer advocacy organization in the nation. Membership consists of over 200 national, state and local, consumer, senior citizen, labor, farm, rural and cooperative groups. Combined, these groups have over 30 million members.

Electronic Industries Association/Consumer Electronic Group represents manufacturers of consumer electronic goods including television sets, video and audio recorders and tapes, audio components, portables and systems, home computers and video games. The 75 CEG manufacturers represent $12 billion in factory sales.

National Association of Manufacturers (NAM) represents 11,500 members who produce in excess of 80 percent of the goods manufactured in the United States. Through NAM's Association Department and National Industrial Council, NAM represents an additional 124,000 employers, employing over 21 million workers.

National Association of Wholesaler-Distributors is a federation of more than 120 national wholesaler distribution associations which have an aggregate membership of nearly 50,000 wholesaler-distributors with 150,000 places of business. The members of the constituent associations were responsible for 60 percent of the $1.2 trillion in merchandise which flowed through wholesale channels in 1981. They employ a comparable percentage, or 3 million, of the 5 million plus Americans who work in a wholesale trade.

National Electrical Manufacturers Association (NEMA) is the major domestic trade association for manufacturers of electrical products, from generation of electricity through transmission and distribution stages and including some end uses like lighting, smoke detectors, motors and controls. At the present time, the membership, including more than 550 companies, is subdivided into about 70 subdivisions based on product lines.

National Retail Merchants Association (NRMA) is the nation's largest trade association for the general merchandise retail industry. NRMA's members operate approximately 40,000 department, chain and specialty stores across the country. Their annual sales are in excess of $150 billion and they empoloy 3 million workers.

National Small Business Association, founded in 1938, represents approximately 50,000 small businesses across the country on Federal legislative and regulatory issues. Members of NSBA are strong free traders, are pro-competition and support antitrust enforcement.

Public Citizen's Congress Watch is a consumer advocacy organization that monitors policy and legal developments affecting consumer interests, health, safety and environmental concerns and citizens' access issues. Scientific Apparatus Makers Association (SAMA) is an association representing the major segments of U.S. high technology, scientific and industrial instrumentality equipment and related supply industries. The 180 SAMA member companies manufacturer more than 40,000 types of high technology products and had annual sales in excess of $13 billion in 1982.

Small Business Service Bureau is a national organization representing 35,000 small businesses across the country. The Small Business Service Bureau was established to provide small businesses with legislative advocacy, management assistance and money saving benefits and services.

STATEMENT IN OPPOSITION TO THE OFFICE MACHINE AND EQUIPMENT DEALERS ACT (H.R. 1159 AND S. 286) BY THE NATIONAL INSTITUTE OF ECONOMICS AND LAW

We, the undersigned economists, are opposed to the "Office Machine and Equipment Dealers Act."

The Act would impose rigidities in the distribution of a wide range of equipment, machinery and software designed for office use. The scope of choice available to suppliers in determining how best to market their products would be reduced. Incentives would be provided for using particular forms of vertical integration that presumably would be in use now if they were efficient.

Both the costs and risks of making and maintaining a dealership network would rise. The associated costs would, at least in part, be passed on to commercial, industrial and governmental users of the equipment and would eventually tend to raise both prices and taxes. Further, the increased market power granted to existing dealerships can be expected to result in increases in prices to greater than competitive levels.

The Act is special interest legislation. Its enactment would reduce efficiency and increase costs in the American economy. It would reduce competition and is, therefore, inconsistant with efforts by both Congress and the President to increase reliance on effective free markets.

We urge defeat of H.R. 1159 and S. 286.

(The attached list of economists have endorsed this statement.)

ECONOMISTS WHO HAVE ENDORSED THE STATEMENT IN OPPOSITION TO THE OFFICE MACHINE AND EQUIPMENT DEALERS ACT

Walter Adams, Distinguished Professor of Economics, Michigan State University, President, Michigan State University, 1969-70.

Kenneth J. Arrow, Professor of Economics, Stanford University, Nobel laureate in Economics.

William Baumol, Professor of Economics, New York University, Princeton University, President, American Economic Association, 1980-81.

Gerard M. Brannon, Chief Economist, American Council of Life Insurance, Director, Office of Tax Analysis, Department of the Treasury, 1966-70.

Allen R. Ferguson, Chairman, National Institute of Economics and Law, President, Public Interest Economics Foundation.

A. Myrick Freeman III, Professor of Economics, Bowdoin College.

Walter W. Heller, Regents' Professor of Economics, University of Minnesota at Twin Cities, Chairman, President's Council of Economic Advisers, 1961-64.

Hendrik S. Houthakker, Professor of Economics, Harvard University, Member, President's Council of Economic Advisers, 1969-71.

W.F. Mueller, Professor of Economics, University of Wisconsin, Chief Economist, Federal Trade Commission, 1961-68.

Roger Noll, Professor of Economics, California Institute of Technology, Senior Economist, President's Council of Economic Advisers, 1967-69.

Frederic Scherer, Professor of Economics, Swarthmore College, Director, Bureau of Economics, Federal Trade Commission, 1974-76.

(Affiliations listed for purposes of identification only.)

Senator KASTEN. Mr. Eizenstat, thank you for your testimony.

The next witness on this panel is Mr. Robert Nichols representing Consumers Union.

Mr. Nichols.

Mr. NICHOLS. Thank you, Mr. Chairman, Senators.

Consumers Union greatly appreciates this opportunity to present to you the consumer perspective on this legislation, S. 286.

Before I do that, I have to note one thing that is of interest certainly to me, and that is that it is unfortunately a fairly rare occurrence when the Reagan administration, the Small Business Administration and IBM, along with Consumers Union, are united in a position. That fortunately and most happily is the case today, and in fact, I even wore my IBM suit today to blend in better.

I want to do two things today to try to summarize in an informal way what my objections to this legislation are which are contained in more detailed fashion in my prepared remarks.

The first is that the legislation is certainly not needed. The evidence which has been presented earlier today and in earlier presentations before the House in our view simply does not warrant any Federal legislation. That is because the evidence is largely anecdotal in nature. It is not compelling, and, in fact, it does not illustrate a systemic problem.

Second, it is not needed because there are adequate remedies in law today. In brief response to the counsel for the equipment dealers, the issue is not whether or not there are 50 State laws which are equally as strict as this bill. The issue, of course, is whether there are adequate State laws to satisfy real objections and real problems in the industry. That is what we feel is clearly the case.

My second point is the major purpose of my presentation today, and that is to explain that this bill, which is not needed, is also highly anticonsumer. There are a number of reasons for that. I will try to illustrate two of them.

The first reason is that this legislation would create inflated distribution costs for the covered products of the bill. What does that mean? That means that somehow and somewhere consumers are going to pay more for products than they do under current law. Consumers will pay either directly or indirectly. They will pay directly, Mr. Chairman, because many of the products we are talking about today—for example, personal computers, typewriters, et cetera—are sold not only to businesses but to individual consumers. We will pay more for those products.

Second, consumers will also pay indirectly, because businesses who must purchase products, office products, at inflated costs, must pass those costs on to the end consumers of their business. Consumers pay more money either way you look at it.

The second major reason why this bill is anticonsumer, is that it is anticompetitive. By that I mean that it will hamper the creation of new competition in this industry at all levels. Moreover, it will reduce the level of competition that currently exists.

How can it do that? First of all, it will lock-in existing dealers, particularly those that do not have a termination date in their dealer agreement with virtually a perpetual right to be a dealer. This is regardless of whether or not their performance is adequate.

Second, it will enhance the opportunity and the incentive for both vertical and horizontal concentration. Now, those are nice technical terms that the Federal Trade Commission is more at ease with than I am. What they mean is that consumers will have to pay higher prices and consumers will have fewer products and dealers to choose from.

Finally, the bill will create high entry barriers. That means new suppliers and new dealers are going to be inhibited from entering business compared to the present system. This again means, of course, that consumers will be faced with less choice than currently and probably will have to pay higher prices because less competition would exist.

In conclusion, Mr. Chairman, I am saying two things. First, despite some real and understandable concern, I think, by the sponsors of this legislation for some problems in this industry, this type of Federal legislation is unwarranted in principle.

Second, in an attempt to respond to some problems that are perceived to exist, legislation, Federal legislation—and I emphasize this word—inherently is anticonsumer.

For that reason we oppose the legislation and urge the committee not to report it favorably to the Senate floor.

[The statement follows:]

STATEMENT OF ROBERT W. NICHOLS, LEGISLATIVE AND REGULATORY COUNSEL, WASHINGTON OFFICE, CONSUMERS UNION

Mr. Chairman and members of the Subcommittee, Consumers Union[1] appreciates this opportunity to testify in opposition to S. 286, the Office Machine and Equipment Dealers Act.

This proposal is anticompetitive, special interest legislation. Its net effect will be to raise the price to consumers of equipment purchased for both office and personal use. It will, as well, raise generally the prices consumers pay for other goods and services purchased from manufacturers, distributors, retailers and service providers who utilize office equipment in their business or professional operations.

While Section 2(10) purports to define "office product" as only that equipment and software designed "primarily for use in an office environment," certain "office" equipment is also marketed and sold for personal use. Such equipment includes personal microcomputers, computer software, calculators and typewriters. To the extent that this ambiguous definition may extend the coverage of S. 286 to these products, consumers will pay directly for the increased costs that the bill's mandated inefficiencies would introduce into this industry.

In addition, consumers will pay indirectly for the increased costs attributable to the bill that are initially borne by business purchasers of the products covered under the bill. That was the case with the costs of inefficiency created by the scheme of trucking rates and route regulation recently discarded through Congressional enactment of trucking deregulation legislation. We believe consumers are increasingly aware that they pay for these kinds of indirect costs.

S. 286 would create perpetual dealerships out of those dealership agreements that do not have a specific termination date. Under such a statutorily-mandated arrangement, the only way that a manufacturer or supplier could terminate an inefficient or uncompetitive dealer who has not created specific "cause" for termination would be to offer to buy back the value of the dealership. If that offer is not accepted by the dealer, Section 301 of that bill would create a dealer right of action in the Federal district courts. Since the bill does not define what is "just, good or significant cause" for termination, a manufacturer supplier could not be certain what degree of inefficiency or uncompetitiveness would satisfy a court of law. Section 201(a).

This means that manufacturers and suppliers would incur the risk of substantial expenses in terminating inefficient or uncompetitive dealers. Over a network of dealerships, the accumulated potential liabilities for buyout costs could be very substantial. A manufacturer or supplier would have to anticipate that potential either

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications, and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, non-commercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 2.3 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

by increasing the costs of products, by continuing to market products through ineffective dealers or by bypassing dealership networks through vertical expansion. The assurance that termination would result in a payout would substantially reduce the manufacturer/supplier's ability to induce retailing innovations that are the source of efficiency and cost reduction.

The potential liability created by Title III of the bill constitutes a disincentive to expand dealer networks and an incentive to reduce the number of dealers authorized to carry a line of products. Such actions would reduce consumer choice and, in many retail markets, that would reduce price competition.

In addition, this potential liability creates incentives for manufacturers to bypass dealer networks through vertical expansion into retailing. This would be especially true of new firms. For smaller manufacturers who cannot by themselves support the cost of such expansion, or who do not manufacture a sufficiently wide range of office equipment to compete at the retail level, the bill creates incentives for horizontal mergers in order to support the cost of such vertical expansion. Such mergers may not become desirable from a marketing point of view only because of the potential liabilities created under S. 286.

Further, both for larger manufacturers who can afford such vertical expansion and for firms formed by merger only because of the incentives created by S. 286, such vertical expansion into retailing would appear to facilitate tie-ins at the retail level that do not exist under a system of independent retail dealerships.

Section 302 prohibits waiver by a dealer of the provisions of S. 286. An entrepeneur, seeking to enter the retail office equipment market in the face of the incentives created by S. 286 for manufacturers to limit dealerships, would not not be able to make his potential dealership more attractive to the manufacturer by offering to forgo the benefits of Section 301. This would constitute a barrier to market entry at the retail level, adding to the already substantial anticompetitive effects of the bill.

The exclusion from the definition of covered products, in Section 2(10), of those products that retail for less than $100 creates additional economic inefficiency. First, dealers would have an incentive to price as many items as possible that now sell for less than $100 at a price greater than $100, in order to secure protection for those products under the Act. Second, the bill is vague as to whether the $100 designation refers to the customary price of the item or to the lowest price at which an item is sold. Thus, dropping the price of an item to less than $100 on special sale could possibly remove an item from coverage under the Act.

S. 286, in sum, is an undesirable piece of legislation which would create economic inefficiency, the resulting costs would be passed on to consumers, directly or indirectly.

If there are indeed abuses in the industry of the manufacturer/dealer relationship, it has not been established that they are widespread. And certainly the provisions of S. 286 have not been demonstrated to be the proper remedy for the acecdotal incidences cited in support of the bill. Indeed, the Federal Trade Commission staff has indicated that adequate remedies already exist for such abuses.

When Congress enacted the Soft Drink Interbrand Competition Act, we predicted that there would follow a parade of other industries seeking similar special favors. The brewing and office equipment retailing industries now appear to have made headway toward that goal. We believe that such a policy can only harm competition and consumers.

We hope that this Subcommittee will not report S. 286 favorably.

Senator KASTEN. Thank you, Mr. Nichols.

The next witness on this panel is Mr. Terry Lautenbach, vice president of IBM Corp.

Mr. Lautenbach.

Mr. LAUTENBACH. Good morning, Mr. Chairman, Senator Exon, Senator Riegle. My name is Terry Lautenbach. I am a vice president of IBM. One of my duties is the development of distribution channels, including dealers, for any IBM products.

It is only in the last 18 months that we have begun to develop authorized dealer networks in the United States for typewriters and personal computers. In IBM's view, Mr. Chairman, enactment of this legislation would be a serious mistake for the following reasons.

First, it is our impression that this bill was proposed to deal with a narrow problem in a particular segment of the office equipment industry, primarily office copiers imported from abroad. Evidence of abuses in this area hardly seem to justify such comprehensive and special interest legislation affecting the entire office equipment industry. In our opinion, this proposal would do considerably more harm than good.

Second, the bill assigns some very generous rights to office equipment dealers and places very onerous responsibilities on office equipment manufacturers without spelling out either party's rights or duties very clearly. This will lead to extensive litigation and tend to complicate relations between suppliers and dealers. Imposition of these unnecessary costs will raise prices for buyers of office equipment.

Third, the many burdens which the bill imposes on suppliers generally would discourage marketing through dealers. If this legislation is enacted, IBM will certainly have to reexamine our position regarding the use of independent dealers.

Fourth, the office equipment industry is in a ferment of innovation and expansion. Growth is rapid, and new U.S. suppliers enter the market almost daily. These new firms, least able to shoulder additional costs would suffer substantially if this legislation is passed.

In our opinion, this bill would seriously hurt competition in the office equipment industry. Let me elaborate.

It is our opinion that a competitive marketplace tends to be self-correcting. Bad business practices, as we have heard, do not survive very long in the face of competition. There are literally thousands of companies producing thousands of products. They have to compete vigorously for this dealer shelf space. It is the dealer's choice as to whether my product or a competitor's will be carried. Manufacturers, in my experience, who are unreasonable will find themselves out in the cold.

Equally important is the fact that U.S. firms do supply most of the office equipment sold in the U.S. market. Many are small, high technology producers of hardware or software, with good ideas, who did not even exist 5 years ago. They have little option, frankly, but to distribute their products through dealers, and they are the ones who will bear the greatest burden resulting from this legislation.

Mr. Chairman, S. 286 is drawn in such broad, ambiguous terms that years of litigation will be required to determine its precise meaning. For example, the legislation provides no answer to the question of whether compensation is due a dealer who is terminated for not living up to his contract through actions such as misrepresenting products, providing poor service or not paying his bills.

Additionally, I would point out that compensation for termination of a dealer agreement includes moneys for good will. This appears to be based on the erroneous view that only the dealer brings good will to this relationship. We believe that the IMB logo and over a half century of developing a reputation of providing high quality products constitutes enormous good will.

In addition, we invest heavily in support programs to help our dealers sell more, service better and manage effectively. These include national advertising, free training for management, free

training for sales and service personnel, development of sales leads, and many other services. So we ask what justification is there for this one-sided concept of good will compensation?

Of even greater concern is the obligation of a supplier to provide any products to a dealer. A manufacturer may not wish to distribute these other products through dealers. The dealer may not be capable of selling or servicing more complex products. For example, a typewriter dealer may not have the capability of selling and servicing more complex computer systems.

Finally, this legislation places ineffective dealers in a position to, frankly, extort unjustified payments from suppliers. For example, a supplier struggling with the ambiguous terminology of S. 286, faced with the need to replace an incompetent dealer, is really motivated to negotiate a settlement which is simply not justified just to avoid the cost and time of litigation.

So for all these reasons we believe that the bill will discourage manufacturers from using dealers. Without this legislation dealers continue to gain more alternatives and additional leverage in negotiating contracts with manufacturers seeking shelf space. We think this is a natural result of vigorous competition between suppliers.

Mr. Chairman, if IBM concludes as a result of this legislation that the use of dealers is no longer the most economic way to sell our products, we can expand our existing sales forces and other channels of distribution. Smaller American firms may not have that choice. We believe that this legislation will certainly hamper U.S. firms in competing with foreign companies, in effect shooting U.S. firms in the foot at a time when we think we should be working to maintain a strong American manufacturing presence in this industry.

We also feel that the ultimate cost of this legislation will be borne by the consumer, smaller manufacturers and the dealers themselves.

Thank you.

[The statement follows:]

STATEMENT OF T. R. LAUTENBACH, VICE PRESIDENT, IBM CORP.

Good morning Mr. Chairman. My name is Terry Lautenbach and I am a vice president of IBM. One of my duties is the development of distribution channels, including dealers, for many IBM products.

As you may know, IBM has traditionally sold its products directly to users. It is only recently that we have begun to develop a dealer network in the United States for sale of typewriters and personal computers. By the end of 1983, there should be 200 to 300 authorized IBM typewriter dealers and hundreds of dealers selling IBM personal computers. We also have nearly 450 value-added remarketers who purchase our small computer products, combine them with their own proprietary products and resell the package to users. All of these dealer arrangements, we believe, would be subject to this legislation.

IBM's view, Mr Chairman, is that enactment of H.R. 1159 would be a mistake for several reasons which I would like to enumerate:

First, the bill was originally proposed to deal with a narrow problem in a particular segment of the office equipment industry, primarily office copiers imported from abroad. The few abuses in this area presented during the last four congressional hearings hardly seem to justify such broadgauged and comprehensive legislation affecting the entire office equipment industry. In our opinion, this proposal would do considerably more harm than good due to its broad adverse impact on suppliers, consumers and even the dealers who are seeking its passage.

Second, as drafted, the bill assigns very generous rights to office equipment dealers and places very onerous responsibilities on office equipment suppliers, without

spelling out the rights or duties of either one very clearly. It would therefore lead to extensive litigation and tend to bureaucratize relations between suppliers and dealers. Imposition of these unnecessary costs will raise prices for consumers of office equipment.

Third, the many burdens which the bill imposes on suppliers generally would in many cases discourage suppliers from marketing through dealers and thus would tend to deprive dealers of many opportunities for profit in a highly competitive and innovative industry. If this legislation is enacted, IBM will certainly have to reexamine its own position regarding the use of independent dealers.

Fourth, the office equipment industry is in a ferment of innovation and expansion. Growth is rapid and new U.S. firms enter the market almost daily. These new firms, least able to shoulder additional economic costs, would suffer substantial penalties if this legislation is passed. In our opinion, this bill would seriously hurt competition in the office equipment industry. Let me elaborate.

THE OFFICE MACHINE AND EQUIPMENT INDUSTRY

The marketplace in the office equipment industry is growing at a rapid pace. There are thousands of companies producing many thousands of products. We have learned that it is necessary to compete vigorously for each dealer's shelfspace. It is the dealer's choice as to whether your product or your competitors' will be carried. For example, dealers normally have room to carry the products of only four to six different equipment manufacturers in their stores, and thus today can select from among 150 different brands of desk top computers and accessories. Dealers are in the driver's seat in determining which manufacturers to select. It is our feeling that manufacturers who are unreasonable, inequitable or arrogant with their dealers will find that normal market forces will result in their quick replacement on a dealer's shelf by eager competitors.

A review of recent congressional hearings on office equipment legislation demonstrates that the problem at which this bill is directed is a fairly narrow one. Past hearings disclosed very few examples of alleged abuses and involved a very limited number of products. This proposed legislation, however, covers an entire industry and a very wide range of products. Most of these products are supplied by U.S. firms, many of which are small emerging high technology companies which have come into existence within the last five years. Since U.S. manufacturers continue to supply the preponderance of these products, it is they, their employees and investors who would bear the greatest burden of this special interest legislation.

Mr. Chairman, we urge your committee, in considering whether this bill would be more beneficial than harmful, to ponder whether such a narrow problem cannot be dealt with by using existing remedies. The Uniform Commercial Code, the Federal antitrust laws, and State laws are already available to deal with any real abuses. In fact, the Nomda Spokesman, the magazine published by the National Office Machine Dealers Ass'n, reports monthly on dealer claims and litigation against suppliers and manufacturers. This would seem to demonstrate the adequacy of existing law in this area.

A principal objection to S. 286 is that it is drawn in such broad, general terms that years of litigation will be required to determine its precise meaning. In the meantime, the industry will be operating under onerous statutory requirements which will impose severe burdens on all who make or use the equipment.

By way of example, what answers are available to the supplier who is faced with the following real life, practical situations in trying to understand its obligation to compensate dealers where: A dealer misrepresents that supplier or its products to consumers; a dealer chronically provides poor service to consumers for the products; a dealer repeatedly fails to meet agreed to sales targets; a dealer is chronically and seriously in arrears in its accounts payable to the supplier?

Under this legislation, compensation for termination of a dealer agreement also includes monies for "goodwill." "Goodwill" is a subjective concept and it is difficult, therefore, to establish its value for the purposes of compensation. In addition, the legislation appears to be based on the misconception that only the dealer brings "goodwill" to the relationship. We believe that the IBM logo and over a half century of developing a reputation of providing high quality, advanced technology products and service constitutes enormous goodwill. We also invest heavily in support programs to assist the dealer in meeting its revenue and profit objectives. Among many such programs, we would only cite:

The benefit of national advertising; free dealer management training; free training for sales and service personnel; sharing of productivity ideas with dealers; customer satisfaction surveys to assist the dealer in tailoring its programs to the cus-

tomer's needs; dealer councils for the exchange of marketing ideas and to help us understand dealer concerns; the development and generation of sales leads; and assistance with point of sale displays.

Obviously, goodwill is not generated solely by the dealer and legislation which ignores this fact is one-sided.

The legislation also encourages frivolous litigation by the few less successful dealers who are failing to live up to their responsibilities to their suppliers and customers, or who may be failing for other reasons, faced with ambiguous terminology in a Federal statute like S. 286, and confronting the need to reestablish his presence in the area as quickly as possible, the supplier will often negotiate a settlement which is not justified but which is less costly than litigation.

The bill thus places ineffective dealers in a position to extort unjustified payments from suppliers. Again, small newer manufacturing firms are the most vulnerable.

S. 286 imposes many other obligations on suppliers which we feel are unreasonable. For example, suppliers must provide products, parts, and schematics on a "Timely Basis." Yet, suppliers may sometimes be delayed in providing products for reasons beyond their control, such as delays in receiving parts or subassemblies from subcontractors, transportation delays or simply because demand for the product is greater than anticipated. The legislation does not specify any reasonableness test within this "duty."

Of equal or even greater concern is the obligation of a supplier to provide any product, part or schematic to a dealer. Some proponents of S. 286 have interpreted this duty to include the obligation to supply, upon request, other products of the manufacturer, including future products. A manufacturer may not wish to distribute other products through dealers or a dealer may not be judged capable of selling or servicing more complex equipment or software systems. For example, under the terms of this legislation, an IBM typewriter dealer could demand the right to sell our most complex office computer systems when they do not have the capability to sell or service these systems.

Under these circumstances, it is unreasonable that a dealer should have the right to sue its supplier for refusal to supply other products when their dealer agreement never contemplated that the dealer would carry anything more than the products specified in their agreement.

Basic terminology in S. 286 such as "Office Product" remains ambiguous, putting the scope of the bill's application very much in doubt. As I've indicated, we believe that the bill discourages the use of dealers. Even though the major problems have been caused by a few suppliers, a broad segment of office products suppliers will be discouraged by S. 286 from seeking out new dealers. In addition, venture capital may very well be discouraged from investment in small companies with good ideas if their primary access to markets becomes risky and expensive.

On the other hand, if this legislation is not passed, more American companies are likely to expand their dealer networks and these same dealers will have more supplier alternatives. Dealers who now feel captive to their existing foreign suppliers would gain alternatives and additional leverage when negotiating contracts with suppliers seeking shelfspace. A natural consequence of vigorous competition between suppliers will be that suppliers who mistreat their dealers will lose them and be forced out of the marketplace—something which we believe is happening today.

To place on suppliers and manufacturers a one-sided list of responsibilities can only increase their caution about opening dealer distribution channels. IBM is an established company with an existing sales force and direct outlets. IBM is attracted to the use of dealers as a low-cost, efficient way to price and sell our products to small business and the consumer. But if we conclude, as a result of this legislation, that the use of dealers is no longer the most economic way to sell our products, and that the cost and bother of litigation is just not worth it, we can expand our existing direct sales forces. Many other firms may not have that choice.

Finally, Mr. Chairman, this bill would impose higher costs at all levels of the office equipment industry. The higher distribution costs of manufacturers and dealers would be passed on to consumers in higher prices. Smaller, emerging high technology companies would feel the bill's impact the most and are the least able to bear them. The excessive load imposed by this legislation would certainly hamper such U.S. firms in competing with foreign firms—in effect shoot U.S. firms in the foot, at a time when we must retain a strong American manufacturing presence in the office products industry. The ultimate cost of this unjustified special interest legislation will be borne by the consumer, smaller manufacturers and suppliers, and the dealers themselves.

Senator KASTEN. Thank you, Mr. Lautenbach.

The next witness is Mr. D. W. McArthur, vice president of the 3M Co.

Mr. McArthur.

Mr. MCARTHUR. Mr. Chairman and members of the committee, good morning.

It is a distinct pleasure for me to be with you here today. My name is Scotty McArthur, and I am vice president of the information group of the 3M Co.

I wish to testify today against the Office Machine and Equipment Act, S. 286. I have been actively involved in the office equipment industry for about 40 years. The industry has changed a great deal in these past 40 years. I want to describe some of these changes and how I view the impact of S. 286 on our role and that of the dealers.

3M has a very broad line of products for the office equipment industry, with many divisions involved in manufacturing and marketing this equipment. They have teleprinters, facsimile equipment, computer-output-microfilm, 14 different models of office copying machines, a wide variety of micrographic equipment, overhead projectors, transparency makers and lettering systems. We also distribute many kinds of supplies and accessories.

We distribute these products in two ways. First, we have a direct sales force. Second, we have a network of independent dealers, and these number in the thousands. But most of our distribution is accomplished by dealers.

We began setting up independent dealers in 1955 all over the United States to handle the Thermofax copying machine, and I know you can remember that very well. I am pleased to say that about 80 percent of the dealers we set up in those early years are still with us. It was and is in our own best interest to do everything we can to insure the success of our dealers.

I do not want you to get the impression that it has always been easy, that our dealer group has been able to move into new technology areas quickly or uniformly with products from our several divisions. In a small number of cases we have found it necessary to terminate a dealer for reasons such as repeated nonfulfillment of quotas and nonpayment of bills. However, quite frankly, we do not want to terminate a dealer. Before ending such a relationship we have bent over backward to help the dealer solve his problems. We support our dealers as long as they do the job for us and for their customers. In fact, we make a major effort, should we have to terminate a dealer, to make sure that his customers are taken care of and that he is fairly treated.

We feel we need dealers. We do many things to support them—sales and technical training, field managers who work directly with the dealers, advertising people who work exclusively with the dealers, incentive programs, lead generation, trade show participation, and yes, visits to our laboratories by those dealer customers.

Our dealers have an organization called Business Products Council Association, BPCA, and this is designed to give them and 3M a chance to compare notes, to exchange information and ideas, and to just do a better job for both sides.

As a businessman with extensive experience in the office equipment industry, I believe the proposed legislation we are discussing

is not good for the dealers and is not good for 3M, and here are my reasons.

One, this legislation is not directed at foreign manufacturers. This bill clearly covers both domestic and foreign companies. This includes mature companies as well as new, high technology companies and companies in which this Congress is very interested.

Two, the present State and Federal laws are adequate to cover the office product market. There is no need for this law based upon the few examples cited here today.

Three, a point on the one-sided nature of this proposed legislation has to do with compensation for termination, including payment for good will. Besides good will being a subjective assessment, the Office Machine and Equipment Dealers' Act seems to suggest that good will is the exclusive province of the dealer. We believe that the 3M name, brand awareness and reputation bring a great deal into the relationship with the dealer. We are proud of our products, and our service organization and this legislation simply does not recognize this fact.

Another important factor against S. 286 is the prohibition of the supplier to terminate an agreement before the end of the contract term unless they are willing to risk litigation or payment for good will. There is no other industry that I am aware of where this is a requirement.

Five, we believe the proposed legislation will result in the need of greatly expanded paperwork and the staff to handle it. One problem will be to determine if a proposed outlet is actually a dealer within the meaning of this act.

Sixth, and the last area of our concern with the proposed legislation centers around the vague language used in key portions of it which could lead to years of uncertainty until the courts determine its precise meaning.

I hope this will explain the reasons why we oppose this legislation.

Now I would like to express my views on some major industry trends. Products marketed by the office equipment industry can be viewed as only copiers, typewriters, calculators, dictating equipment and the like, but this would be a very narrow view, indeed. A more accurate view of the industry involves office automation equipment and integrated office systems, input devices, print devices, equipment that manipulates and stores data, and local area networks, products that transport information over long-distance wires, in seconds.

This leads to changes in the type of products offered to meet the needs of the marketplace, the need to increase the productivity of the information worker. This will mean more sophisticated systems that will be offered to dealers, and we hope that they can participate in this program.

Distribution of office products has undergone dramatic change in the last few years. No longer are the distribution options only direct sales or sales through dealers, but increasingly through direct mail, retail stores, and business product centers are used to get the products to the end user.

In effect, this proposed legislation would needlessly restrict U.S. manufacturers in making basic marketing distribution decisions.

Therefore, Mr. Chairman, I would like to briefly summarize and state that we believe the Office Machine Equipment Act is unnecessary, one-sided, burdensome and vague. We wish to join the Department of Justice, the Federal Trade Commission, our industry colleagues and federations representing more than 1 million companies in opposing enactment of this legislation.

Thank you.

[The statement follows:]

STATEMENT OF DONALD W. MCARTHUR, VICE PRESIDENT, 3M CO.

Mr. Chairman and members of the Committee, good morning. My name is Donald W. McArthur. I am known in the office equipment industry as Scotty. I am vice president of the Information Systems Group of the 3M Company in St. Paul, Minnesota. I wish to testify against the Office Machine and Equipment Dealers Act, S. 286.

The Office Machine and Equipment Industry has been my professional life. I have been immersed in all its aspects for over 40 years beginning in product design and engineering. In 1946, I designed and built the first aperture card camera. This device is utilized in micrographics. Since that time, I have recorded patents on a number of new technologies associated with micrographics and microfiche.

In 1960, I joined the 3M Company, and I headed up the Microfilm Products Department. In 1962, I was named vice president of the then newly-formed Microfilm Products Division.

A major portion of my responsibility for the last 20-odd years has been the development of micrographics as an industry. As a consequence, I served as one of the founding members of the National Microfilm Association. The organization is now called the Association for Information and Image Management. I have served the organization as president, board member and in various other capacities.

While president of the NMA, I was involved in the organization of the International Micrographic Congress. The IMC (now known as the International Information Management Congress) is a strong voice for the micrographics industry all over the world. I have served as president of the IMC, on its board of directors and I am now chairman of the Publications Committee.

In addition, I served for several years on a seven-member committee entitled, "Micropublishing Advisory Council" to the then Public Printer, John J. Boyle, of the U.S. Government Printing Office. The Council reviewed and made suggestions for the GPO conversion of public domain documentation to a microfiche format for distribution to depository libraries.

I have long recognized the need for microfilm to become more automated and standardized, and the need to use it in conjunction with computer hardware and software. In recent years, we at 3M have been active in changing the direction of the microfilm industry from one that was product-oriented to one that is systems-oriented. I strongly believe that this move has guaranteed an important role for microfilm or micrographics in the so-called office of the future.

On October 1, 1982, I was named vice president of the Information Systems Group at 3M. This group includes the following 3M Divisions: Business Communication Products Division, Office Systems Division, Engineering Systems Division, Equipment Service and Support Division, Electro-Mechanical Resources Division. Let me briefly explain what we do.

The Business Communication Products Division manufactures and markets a line of facsimile equipment, teleprinters, computer-output-microfilm (COM) systems.

The Office Systems Division manufactures and markets a line of 14 different models of officer copying machines, a non-impact printer and a wide variety of micrographic equipment such as reader-printer, readers, cameras and duplicators. Each of thesse pieces of micrographic equipment is available in several models.

The Engineering Systems Division manufactures and markets a line of micrographic equipment for the engineering office market. This equipment includes readers, reader-printers, enlarger printers, cameras and duplicators.

The function of the Equipment Service and Support Division is to service the office equipment sold by the Divisions in the Information Systems Group. ES&SD also services equipment sold by the Audio-Visual Products Division. The A-V Division manufactures and markets several models of overhead projectors, transparency makers and lettering systems.

The Electro-Mechanical Resources Division is the manufacturing arm of the Information Systems Group.

As you can see, 3M has a very, very broad line of products for the office equipment industry, and several Divisions involved in marketing them.

Now that I have outlined the Divisions that I am responsible for, and provided you with a brief description of each one, I would like to describe the way we distribute our products.

We distribute our products in a number of ways. First, we have a direct sales force. Secondly, we have a network of independent dealers. We also use many subcategories of dealers, which number in the thousands across the country and use retail stores as well as other techniques. However, most of our distribution is accomplished by the first two categories listed.

I would like to briefly describe our direct means of sales, and then go on to the dealer network.

A major part of our sales and profits are produced by our direct sales force. These men and women are highly trained, and they do an excellent job. They handle the large national accounts. They also work in specific vertical or horizontal markets that need special handling. We also have this sales force operate in certain geographic areas. These people are an important part of our total marketing plan.

Now to our dealer network. We began setting up independent dealers in 1955 all over the U.S. to handle our entry into the then embryo office copying machine market. I'm pleased to say that about 80 percent of the dealers we set up in those early years are still with us.

I believe that one reason for this success is that we picked strong entrepreneurs. We've kept them supplied with good products over the years, and also with effective support and training programs. It has helped that we are in a growth industry.

Contrary to the almost adversarial environment set up by the proposed legislation we are discussing, we at 3M have always worked closely with our dealers to help them succeed.

It was and is in our own best interest to do everything we can to ensure the success of our dealers. I don't want you to get the impression that it has always been easy and that our dealer group has been able to move into new technology areas quickly or uniformly with products from our several Divisions. We have always worked with the dealers, however, to achieve the results we both look for.

In a small number of cases, we have found it necessary to terminate a dealer in a specific product line. But before we did, we bent over backwards to help the dealer solve his problems. We support our dealers as long as they do the job for us and their customers. If a dealer is terminated, we make sure that both his customers are taken care of for service and supplies and that any damage to his business is minimalized.

Much has been made by proponents of S. 286 about suppliers giving dealers unrealistically high sales quotas. I cannot speak for other suppliers or about general industry practices, but I can speak about 3M's policies. We at 3M use careful research and develop objective indices to calculate the quota for each of our dealers. The indices we use may differ from 3M Division to 3M Division because of the composition of the business, but you can be certain that we have a solid, equitable basis for our dealer quotas.

I have watched these dealer businesses grow and prosper over the years. I have watched some of the "young men" who started the dealerships many years ago turn the businesses over to their sons. I know these people very well. I appreciate them. They are like family to me, and I believe they feel the same way about me.

Our dealers are professionals in the best sense of the word. We at 3M feel we need them, and we do a great many things to support them. These include: Sales and technical training (in St. Paul and at their location), field managers who work directly with the dealers, advertising people who work exclusively with the dealers, advertising and promotional aids (that reach regional and national audiences), incentive programs, lead generation, trade show participation, and visits to our laboratories for their customers. But most of all, we listen to our dealers with an open mind.

Our dealers have long had an organization called Business Products Council Association (BPCA). It is an organization designed to give them and 3M a chance to compare notes, to exchange information and ideas, to air grievances . . . on both sides. BPCA is an excellent vehicle, and it goes back many years. I believe it will continue to be an excellent vehicle for many years to come. The legislation we are discussing asks that dealers be given the "right to assemble." BPCA is living proof that our dealers have that right, and we heartily endorse that right.

To summarize what I have said up to now, I want to go on record as a businessman who has extensive experience in the office equipment industry. I believe I understand the products and the people who move them to market. Our independent dealers are an important part of this process for us, and we need them and appreciate them.

However, in my opinion, the proposed legislation we are discussing is not good for them and not good for 3M.

Now I would like to address myself to the reasons for our position against the Office Machine and Equipment Dealer Act.

3M POSITION REGARDING PROPOSED LEGISLATION

This legislation is not aimed at foreign manufacturers nor big business as its proponents have suggested. It will have an adverse effect on U.S. manufacturers including both mature and developing high technology companies. We are against this proposed legislation for a number of reasons, but most basically because we feel it is:

UNNECESSARY

The remedies available in the State and Federal law are adequate to cover the office products market. As a back-up to the laws covering the relationship between manufacturers and dealer, in cases of abuses by the supplier, the realities of the business world come into play. The dealer will search out a new supplier.

We as a manufacturer, in a very real sense, compete for our dealers' time and the time of their sales force. If we intentionally engage in tactics harmful to our dealers, they most certainly would promote the products of other manufacturers. The dealers could use our products as door-stoppers, change the commission plans of the sales force, emphasize competitive equipment, or change discounts to favor a competitor. And the dealers could even divert leads to competitive products.

To elaborate further on this point of dealer strength, a headline in the business section of the Minneapolis Star and Tribune, August 22, 1983, states that personal computer makers are fighting for space in stores. The article under the headline discusses the "shelf space wars" in which over 130 microcomputer manufacturers are competing for limited amount of shelf space in 60 local stores.

For a company like 3M, with our current lines of office equipment, we are not as affected by the "shelf space" problems. This is because our products aren't sold exclusively in the store or dealer location. We compete for the salesperson's product knowledge, for the direct mail he sends out, for the prospecting he does for our products. And we have to compete for this person's efforts as they sometimes have a full range of products from several manufacturers.

Further, a reading of the anecdotes cited in the introduction of this legislation would lead one who is knowledgeable about the industry to assume the legislation was aimed at one portion of the office equipment market, the copier portion, and a very small number of participants. It is incredible that isolated situations in one segment of our industry dealing purportedly with primarily foreign suppliers could spawn legislation adversely affecting American manufacturers, suppliers and purchasers in one of the largest, most dynamic, competitive and rapidly changing segments of the American economy.

In my experience, there is nothing unique in our industry which should cause us to be treated differently than suppliers in any other industry.

Secondly, we feel this legislation is:

ONE SIDED

The legislation puts all the burdens on the manufacturer/supplier while no obligations or responsibilities are assigned to the dealer.

A supplier of office products must in stated aspects of the dealer agreement, act in "good faith." There is no corresponding "good faith" obligation imposed on the dealer.

The supplier must furnish the dealer on a timely basis, "any" office product, part, reference manual or schematic related to an office product. There are at least two major problems with this language.

First, "any" product can be construed to mean future products from the manufacturer even though the dealer agreement stipulates only certain specified existing products. This could also mean being forced to give to existing dealers a line of products that could be more effectively sold by other means.

For example, we deliver a very sophisticated $100,000 piece of rental office automation equipment designed to be linked with other office systems. Let us assume the dealer doesn't have the capital or cash flow to handle this product. Nor does he have the sales force to promote such a product. Nor lastly, does he have the skill level in the service organization to maintain it. Yet, under this legislation, a dealer could demand to handle this product. Under these circumstances it just doesn't make sense to give them the product, or for the dealer to take it.

Or, take another situation which is very common today—acquisition of a company, If we acquired a company having a very specialized product for the office and a dealer organization in place (and this has happened in a number of instances), our existing dealers could demand the product even though this would not conform to our desired business and distribution strategy. This also brings into question potential claims from dealers of the new product line for products already handled by existing dealers.

Secondly, the requirement stated above to supply product, parts manuals and schematics on a "timely" basis makes no provisions for delays outside the control of the manufacturer who may be waiting for sub-assemblies or parts from an outside vendor. Or, as has been the case in many instances, the demand greatly exceeds the manufacturer/supplier's ability to produce the product. Any of these delays could lead to an action for damages against the manufacturer/supplier since there is no standard to determine what constitutes a timely basis.

A vital point on the one-sided nature of this proposed legislation has to do with compensation for termination including payment for goodwill. Besides goodwill being a subjective assessment, the Office Machine and Equipment Dealers Act seems to suggest that goodwill is the exclusive province of the dealer. We believe that the 3M name, brand awareness and reputation bring a great deal into the relationship with a dealer. The proposed legislation does not recognize this fact.

Finally, this proposal places undue burdens on the manufacturer in many other ways. Among these I would cite the prohibition of the supplier to terminate an agreement before the end of the contract term unless they are willing to risk litigation, or a payment to the dealer for the fair and reasonable value of the business including an amount for goodwill. There is no other industry that I am aware of where this is required. Further, even if a supplier is dissatisfied with the performance of a dealer and wishes to terminate the relationship at the conclusion of the term of the agreement, the supplier may not be free, to do so unless a novel good faith definition is met. The supplier, in fact, may be required to bargain with the dealer over the proposed termination even if the termination occurred due to either repeated non performance or simple failure to pay one's bills.

We also believe the proposed legislation will result in the need to greatly expand the paperwork and administrative staff to handle it. One problem will be to determine if a proposed business entity is actually a dealer within the meaning of this act. Because we distribute the various office products through a variety of distribution channels involving thousands of outlets, traditional and non-traditional, we would have to create and maintain files on each dealer in the market area and the products he sells. These must be updated each time any change is made either in the dealer or product line he sells. In addtion, since we have several divisions of the company involved in selling products via different distribution to the end user, we would have to set up a monitor force to coordinate the activities of the sales, marketing and operations departments of these divisions.

We believe the results of all of these requirements would give rise to costs which would be passed on to the end user. These costs could arise from increased litigation, the cost of the additional paperwork and people to insure compliance with the law and lastly, the added burdens of staying with an inefficient dealer.

Fourthly, there are many anti-competitive aspects to this proposed law which are well covered by the Federal Trade Commission letter to the Chairman of the House Judiciary Committee, dated July 17, 1983, and the letter from the Department of Justice, dated August 8, 1983, to the same recipient.

A major concern is that this piece of legislation creates a barrier to entry for both a manufacturer, particularly a new company, and at the dealer level. A manufacturer of office equipment may elect to hold back because of his inability to cover the costs of a direct sales force or other forms of direct distribution. His option is to go through dealers with the potential costs involved in termination, record-keeping, etc. The barrier for a "new" dealer is a very real one as suppliers may be hesitant to change dealers or add dealers for the reasons cited.

The $100 retail price requirement will lead to manufacturers and wholesalers discussing retail pricing with dealers since it is the dealer who sets this price. This could lead to uniform pricing. Keeping track of the retail pricing of literally hun-

dreds of thousands of items to see if they are covered by the act will add to the additional costs of doing business which I referred to previously and which ultimately will be borne by the end user. Additionally, special promotions, package selling, normal quantity discount schedules and rebates will turn this requirement into a nightmare.

Finally, the anti-competitive aspects of this act could, for example, encourage manufacturers to use only large dealers more capable of selling their total product range, or may cause them to cancel contracts with dealers unwilling to expand their business enough to get the growth needed by the manufacturer. Some larger manufacturers may expand their direct sales force of other types of company-owned distribution. This is an example of the proposed law working against the dealer's interests.

Frankly, as I have attempted to point out, a vital concern with the proposed legislation centers around the vague language used in key portions of it which could lead to years of uncertainty until the courts determine its precise meaning. There are crucial items such as what constitutes and "office product?" What constitutes "good faith" under the act? What constitutes "just cause" for terminating a dealer? What is construed to be "on a timely basis?" Does "any" product require a manufactruer/supplier to give to a dealer a line of products not intended for dealer distribution and not covered in a dealer agreement including future products?

I hope the foregoing will give you some of the major reasons why 3M opposes this legislation.

INDUSTRY PERSPECTIVE

I'd like to turn now from the reasons 3M opposes this legislation to a view of the office equipment industry, and some major industry trends.

The products marketed by the office equipment industry can be viewed as only copiers, typewriters, calculators, dictating equipment and the like. This would be a narrow view . . . actually it is an obsolete picture. A more accurate and timely view of the industry involves office automation equipment and integrated office systems. We speak today about input devices, print devices, local area networks, equipment that manipulates and stores data, and products that transmit data over long distances in seconds.

I think it is fair to say that the people who define the office equipment industry vary greatly in their definitions. They differ on both the size of the market and its potential.

As I stated earlier, S. 286 is not exclusively anti-Japanese or anti-foreign manufacture. Its negative impact will be felt by U.S. manufacturers and distributors of office equipment, as well as the buying end user in the form of higher prices. This legislation does not pertain to a situation of small dealer versus large manufacturer. With some of the new high technology products, it's not unusual to find that the dealer is literally larger than the manufacturer who supplies him. I believe that the damage caused if this legislation is enacted will impact both large and small manufacturers or suppliers, but perhaps hurt the small to medium sized manufacturer most of all.

What is an "office product?" S. 286 states that it is any physical object or office machine software which is designed primarily for use in an office environment and which has a retail price greater than $100 per item. Certain exemptions for products or marketing techniques are enumerated. The potential number of products or marketing techniques are enumerated. The potential number of products covered by it is enormous. I could encompass over 6,000 manufacturers located in 50 states and employeing over 650,000 people using just the Department of Commerce SIC codes as a basis.

The size of the office equipment industry, as you might expect, depends on what parameters are used . . . how you define it. By even the narrowest of definitions of products covered, we are talking about the market today of between $11 billion to perhaps $15 billion.

The prospects for growth over the next five years are in the range of 15–30 percent compounded annual growth, again depending upon what products are included in the definition. Size of market estimates in 1986 could be in the range of $25–$40 billion.

To characterize the trends in the industry, we must look at a number of factors including: the market itself, secondly the products covered, distribution channels, competition and finally, projected growth.

The market for office products or if you will, office automation products, will increasingly change from the industrial sector to the information sector, from a prod-

uct-oriented business to the service businesses. This shift in prospects or market parallels the dramatic shift in employment from smoke-stack industries to the information and services industry that has been going on in the United States. With this change will come a change in the types of products offered to meet the needs of the marketplace—the need to increase the productivity of the information worker. This will mean both more sophisticated systems and systems that must be linked together.

The products will evolve from stand-alone units to units that are linked together via a networking system, and they will communicate with each other. Some of these systems are word and text processing systems, video conferencing systems, data processing systems, local area networks, facsimile systems, computers, and, of course, the critical item of software to operate them.

Distribution channels for office products have undergone a dramatic changeover during the past few years. No longer are the distribution options direct sales and sales through dealers, but increasingly direct response marketing, retail stores and business product centers are being used to get the product to the end user. The primary reason is efficiency in reducing marketing costs in getting low end products to the small and medium-sized business or home customer.

This office equipment industry, as I mentioned earlier, does not lack for competition. It is safe to say the office equipment or as it is more commonly referred to today, the automated office industry, is one of the fastest growing employment sectors in the U.S. today and will continue to grow in the near term.

There are currently in excess of 100 major corporations manufacturing word processing equipment, electronic typewriters, work stations and digital PBX systems. And, of course, thousands of smaller firms involved in software, peripheral equipment and the like. This proliferation of manufacturers is being added to constantly as are the products being developed and marketed.

The effect of this proposed legislation would needlessly restrict U.S. manufacturers in making basic marketing and distribution decisions which in turn, gives each of us less flexibility in maintaining a competitive posture and could retard our ability to expand and grow in the future.

In summary, we believe the proposed legislation makes for bad public policy. The argument that it is anti-Japanese just doesn't wash. This legislation, if passed, would hit U.S. office equipment manufacturers, including high technology companies, as well as foreign suppliers. Additional costs of doing business as a result of this law, no matter the source of the product, will be borne by the American buyer.

In summary, we believe that the Office Machine and Equipment Dealers Act is:

UNNECESSARY

It has not been demonstrated by the anecdotes cited, few in number and small in relation to the hundreds of thousands of dealer agreements that there is a need for this all-encompassing law. As others have testified, remedies are now available in common law, the Uniform Commercial Code, Federal Anti-trust Laws and State laws to more than adequately cover the situation.

ONE SIDED

The legislation puts all the burdens on the manufacturer while there are no corresponding obligations or responsibilities assigned to the dealer.

BURDENSOME

It will be a massive administrative nightmare to track all of the products covered by the $100 provision. Likewise, considerable new effort will be required to insure compliance with the provisions of the law regarding dealer notification.

VAGUE

Key language in the act is so vague that lengthy Federal court action will result to determine their meaning.

3M joins the Department of Justice, the Federal Trade Commission, our industry colleagues IBM, CBEMA and the more than 17 associations, and federations representing one million companies, in opposing enactment of this legislation. We at 3M would rather use our time and energy to grow with this rapidly expanding market sector. This legislation would help deter us from that goal.

Senator KASTEN. Mr. McArthur, thank you very much.

The next witness and the final witness on this panel will be Mr. Tom Pratt, the vice president of Herman Miller, Inc.

Mr. Pratt.

Mr. PRATT. Good morning, Mr. Chairman and Mr. Exon and Senator Riegle. Thank you for coming this morning, and thank you all for giving us an opportunity to present both the views of the Business Institutional Furniture Manufacturers, known as BIFMA, as well as those of Herman Miller, Inc. Herman Miller is a member of BIFMA. It is a trade association of 160 members, and we are all engaged in the business of supplying furniture, furniture systems, software, and various services necessary to apply those products for office and institutional use.

Herman Miller is rather typical of the membership of this association in that we have resale agreements of various kinds with independent dealers throughout the United States and numbers foreign markets as well. We are a publicly held company. We are headquartered in Zeeland, Mich. Our products, services, and softwares are used in offices, laboratories, hospitals, and factories.

We are very dependent on the cooperation of and participation of a strong, independent dealer network which is the key and we think essential link between us and our customers. We currently have over 300 of these dealers operating throughout the United States, and the nature of our programs dictates that we maintain a close working relationship with those dealers.

Ten years ago we established and financially underwrite today a dealer advisory council that reviews new products, programs, and policies before they are initiated or implemented, and others in our industry have similar arrangements. We have a dealer policy that has been in effect since 1977 that states how we intend to do business, and it was formulated with the dealer advisory council.

We initiated dealer contracts in 1973 in our industry, and today we have contracts that legally bind both us and our dealers. Our industry makes substantial investments in their dealer organizations as a whole as well as individual dealerships by providing training programs, financial support, warranty and service support, promotional programs.

Why would a manufacturer bother? The answer is simple. Dealers are very important to the marketing program of all of us, and thus, there is great competition for dealers today. And the way manufacturers win them is with products that sell at good margins and to become a company with which it is easy to do business. These kinds of investments make good business sense and are mutually beneficially both to the manufacturer and the dealer.

Therefore, we oppose this bill for several reasons, first, because it imposes new and uncertain standards on manufacturers governing their relationships with dealers. Besides those already covered by my colleagues, we see the imposition of this standard as an impingement on our freedom to contract. The effect of a Federal intervention in that process will place us in an intolerable position of having a Federal court or an arbitrator retroactively rewrite plans and strategies.

The proposed Federal standard would also apply to termination and modification of dealer agreements. We need to terminate or modify relationships with particular dealers, and they may occur

for a variety of reasons, nonperformance, insufficient resources for growth, change in management, and thus management attitude, or changes in the marketplace.

In all of these cases, we need the flexibility to dissolve relationships and form others. The insertion of a redundant Federal standard into that process will substantially remove our flexibility.

Second, we see this legislation as one sided. These situations will impose enormous risks and burdens on all manufacturers, but will especially be harmful to small manufacturers in our industry. Many dealers and dealer cooperatives which this legislation proposes to protect are larger than many of the manufacturers in our association. We believe the bill would have two long-term negative effects, one, that of encouraging manufacturers to set up company-operated outlets—that is bad news for dealers and bad news for manufacturers—and it would also tend to make manufacturers reluctant to modify relationships.

The law in Puerto Rico, law 75 is an excellent example. It virtually makes it impossible to remove a dealer, though he is no longer appropriate in that territory. The customer is not being served. They must go through all kinds of shenanigans to get the product because they cannot get the service they need. The product gets there, but it is very difficult and is very costly.

While flexibility is required here, it is also important for you to know that we do not always choose to divest ourselves of dealers. Manufacturers in our industry regularly engage in financially shoring up dealers, extending credit beyond normal limits. They provide help in management, and they supply consulting. It is not altruism. It is just good business.

Finally, the matter of exempting certain products from the bill should be addressed. Apparently an effort has been made to exclude the office furniture industry from S. 286. This very day, our product development engineers are working on products which incorporate highly sophisticated electronic and telecommunication technology. The day is close at hand, sir, when neither you nor the courts will be able to say whether a desk or a work station is a piece of furniture or an office machine or a telecommunication device.

And we sent to your office on September 27, 1982, a letter with a picture that shows an example of this phenomenon.

In conclusion, let me stress our belief that the natural forces of the free market supply the best means for regulating dealer-manufacturer relationships. Competition is the key. More than 200 companies, not 3, not 5, not 10, 200 companies compete in our industry, all of them competing for the services of a limited number of dealers. Under these circumstances, we do not believe that it is necessary for Congress to enact legislation for the protection of dealers in this industry. We believe this to be ill-advised, special interest legislation, and we sincerely hope, Mr. Chairman, that you see the wisdom of not reporting this bill out of committee.

Thank you.

[The statement follows:]

STATEMENT OF THOMAS C. PRATT, GROUP VICE PRESIDENT FOR SALES AND MARKETING, HERMAN MILLER, INC.

Mr. Chairman and Committee Members, thank you. I am Tom Pratt, Group Vice President of Sales and Marketing, at Herman Miller, Inc., and I want to take this opportunity to thank you for allowing us to place the views both of the Business and Institutional Furniture Manufacturers Association as well as Herman Miller, Inc.

I hope to be able to show our opponents why furniture folks remain vitally interested. Herman Miller is a member of the Business and Institutional Furniture Manufacturers Association. It is a trade association with 160 members and we all are engaged in the business of supplying furniture and furniture systems, software, and various services necessary to apply those products for the office and institutional use.

It is typical for manufacturers in this industry to rely heavily on dealers and distributors to create a national market presence.

The industry is a rapidly growing industry which exceeded $4 billion in 1982.

In the State of Michigan, for example, this industry employs over 16,000 people. this figure does not include the thousands more employed in ancillary businesses dependent on supply in parts, materials, and services to BIFMA members. Thus we are concerned about the impact of the bill not only on us as manufacturers, but also as citizens of one of the many states that has suffered severe economic setbacks in recent years.

Herman Miller is rather typical of the membership in that we have resale agreements of various kinds with independent dealers throughout the United States and in numerous foreign markets as well. We are a publicly held company. We are headquartered in Zeeland, Michigan. Our products and services and software are used in offices, laboratories, hospitals, and factories.

We have manufacturing facilities throughout the State of Michigan and four other locations besides Zeeland. We have locations in Dallas, Texas; Irvine, California; Roswell, Georgia. We have sales facilities in every major market in the country, with representatives there. We also have manufacturing facilities and subsidiaries, licensees, and distributors throughout the Free World.

We believe that this bill would impose enormous risks and burdens on all manufacturers, but will especially be harmful to small manufacturers in our industry. Many dealers and dealer cooperatives are larger than the manufacturers that serve them, and we believe the bill would have the net long-term effect of encouraging manufacturers to set up company-operated outlets versus independent dealers—bad news for dealers, bad news for manufacturers.

Herman Miller is fortunate to have successful performance records throughout the many years it has been in business. We are able to do this with the cooperation and participation of a strong dealer network, which is the key and, we think, essential link between us and our customers.

We have a strong commitment to independent dealers and dealer network. We currently have over 300 independent dealers operating throughout the United States, and our programs dictate that we maintain a close working relationship with our dealers.

Ten years ago we established, and financially underwrite today, a dealer advisory council for the purpose of advising us on product, on program, and policy. Council members are invited in on a regularly scheduled basis throughout the year to review new products, new programs, new policies before they are initiated or implemented, especially where they affect them, and others in our industry have similar arrangements.

We have a dealer policy that has been in effect since 1977. It was formulated and discussed at the dealer advisory council, and a subcommittee of the council spent over a year working on the wording of that agreement and policy, as well as our own people. We finally signed it together and it is in effect today.

We pioneered contracts in 1973 and today we have a contract that legally binds us as well as them, and did so willingly. Herman Miller makes substantial investments in its dealer organization as a whole, as well as individual dealerships by providing training programs, financial support, warranty and service support, and promotional programs as well.

Why would a manufacturer bother? The answer is very simple—because dealers are very important to our marketing program. There is great competition for dealers today, and the way you win them is with product that sells at decent margins and to be easy to do business with. These kinds of investments make good business sense and are mutually beneficial to the manufacturer and the dealer.

Good dealers are essential to our success. Bad dealers can cause an incalculable harm in a particular market that takes years to overcome, for themselves, the dealers, and the manufacturers as well. We do not own nor do we control dealerships, and dealers do not own us. We have to work together.

A partnership by definition is an independent relationship. It must be mutually beneficial. When it stops being mutually beneficial for either of us, we need the right to dissolve that relationship.

Therefore, we oppose this bill for several reasons:

First, we object to the bill because it imposes a new and uncertain standard of good faith on manufacturers governing the relationships with dealers. The proposed federal standard of good faith is different from the good faith standard of conduct which is set forth in the Uniform Commercial Code, which has already been noted, and we do not see the need for a new and different federal definition.

We see the imposition of this standard as an impingement on our freedom to contract. Dealer agreements are predicated on a comprehensive marketing plan, modified from time to time for strategic reasons. The selection of dealers, the availability of various products to those dealers, and the terms and conditions of our arrangements in specific circumstances must be consistent with our plans and strategies that we hope to achieve success for us or our dealers in the marketplace. Imposition of a federal standard on that process will place us in the intolerable position of having a federal court retroactively rewrite our plans and strategies.

The new federal standard would also apply to terminations or modifications of our arrangements with various dealers. The need to terminate or modify a relationship with a particular dealer may occur for a variety of reasons—nonperformance, insufficient resources for growth, change in management and, thus, management attitude, or changes in the marketplace.

In all of these cases we need the flexibility to dissolve relationships and form others or add additional dealers, and the injection of a federal static standard into that process will substantially impair our ability to meet the needs of our customers by ensuring the existence of an ineffective dealer net market.

These situations will present manufacturers with tremendous risks. The effect will be a reluctance to modify relationships with bad dealers, which will work to the detriment of the consumer as well as the manufacturer. Law 75 in Puerto Rico is an excellent example.

It is virtually impossible to remove a dealer, though no longer appropriate, in that territory. The customer is not being served. He has to go through all kinds of shenanigans to get the product in because he cannot get the service he wants to. It goes in, but very difficult.

It is also important for you to know that we have not always chosen to divest ourselves of dealers who are unable to perform due to limited resources. Let me give you one example of many that demonstrates the manufacturer's investment to support dealers.

A dealer in a major city was experiencing financial difficulty as well as not being able to provide the level of skills of marketing services that we needed in that city, and we faced a choice. Do we help this present dealer or do we get another? We decided that we would rather develop the present dealership than bring in another.

So we went, sent a team of Herman Miller people who had the background and expertise in marketing, finance, and sales, and we sent the team in at no cost to the dealer. That team evaluated the situation, came back with a written recommendation. The dealer was free to take that advice or turn it down. He chose to take it, and subsequently turned the business around and has become this year our top volume dealer.

That has happened at least four times during this past fiscal year for us. This side of the dealer-manufacturer relationship appears to have been overlooked in examining the need for Senate Bill 286.

Secondly, we are concerned about the section of the bill that would obligate a manufacturer to furnish the dealer with any office product the dealer desired. Herman Miller segments its markets, making certain products available to dealers on a selected basis, for reasons of market penetration, dealer expertise, customer service, or market presence. We believe that it is not appropriate for Congress to in effect make marketing decisions for manufacturers regarding the availability of product to dealers.

Thirdly, another troublesome provision of this bill is the obligation of a manufacturer to pay fair and reasonable compensation to a dealer for whatever the value to the dealership of the dealer agreement might be, including a reasonable amount for good will.

Any such determination, we feel, will be highly subjective and, in the long run, will impose an immense contingent liability on maunfacturers that will eventually be reflected in the increase in price paid for the product by consumers.

We believe that this provision is both unfair and unreasonable.

Also, we note that the dealer is not obligated to compensate the manufacturer if he decides to drop the manufacturer's line or fails to perform, and that happens not infrequently.

Finally, the matter of exempting certain products from the bill should be addressed. Apparently an effort has been made to exclude the office furniture industry from Senate Bill 286. This very day our product development engineers are working on products which incorporate highly sophisticated electronic technology. The day is close at hand when it will be impossible to say whether a desk or a work station is a piece of furniture or an office machine, and we sent your office on September 27 a letter with a picture that was an example of that phenomenon.

We certainly do not wish to litigate that question and we believe this legislation could be obsolete within two years of its passing. Even if our industry were excluded from the bill, we do not feel that Senate Bill 286 is the solution to the problems originally cited by the office equipment dealers.

In conclusion, let me stress our belief that the natural forces of the free market supplies the best means for regulating dealer/manufacturer relationships from the standpoint of providing the consuming public with the best products at the most reasonable price. Competition is the key.

More than 200 companies in our industry have been identified as manufacturers competing in the office furniture and furniture systems market. Approximately 80 percent of those competitors have entered the systems business since 1967. All of those manufacturers are competing for the services of dealers in our marketplace.

Under these circumstances, we do not believe it is necessary for Congress to legislate contractual standards for the protection of dealers in the office furniture market. We believe any short-term or special interest legislation of this sort that may have negative long-term effects will impair the ability of all of us to succeed, and we sincerley hope, Mr. Chairman, that you will consider the adverse effects of this bill.

Senator KASTEN. Thank you very much, Mr. Pratt.

I see that Senator Riegle has joined us. We are happy to have you here.

Senator RIEGLE. Thank you, Mr. Chairman.

I am glad to have had a chance to hear all the witnesses. I think Herman Miller may need to send us a longer witness table so that we can accommodate everybody somewhat more easily.

But I think this has been important testimony, and I have great regard for my colleague from Nebraska who I know has strong feelings about this.

But I just would say that I think we have to be very careful about the degree to which the Government tries to intervene in a basic relationship between supplier and dealer where both independent parties know what the rules are before they get into the arrangement.

And so, while I am concerned about the problems that may arise and what might be done about them, I myself am concerned about an injection of Government force into this area, and I think the points that have been made today by this panel of witnesses are important along this line.

I would like, Mr. Chairman, when it is appropriate, to specifically address a question to Mr. Pratt of Herman Miller, because this is a very important and very significant company representing a very important industry in my State, and I would like to know, for example, what your own history has been, what Herman Miller's history has been with your dealer network.

I understand that you have over 300 independent dealers across the country, and I am wondering what the history has been. Have

you encountered any significant number of complaints from these dealers? Have they been with Herman Miller over a length of time, and if so, what would that profile look like? And I am wondering, you know, what you can tell us about what actually happens within your firm along this line that would relate to the kind of inquiry that we are taking part in today here.

Senator KASTEN. Go ahead and respond at this point, and then we will go back into the regular order for questioning.

Senator RIEGLE. I thank the chairman very much for his courtesy.

Mr. PRATT. Our experience with dealers is a fairly long one in that we have used dealers now for better than 25 to 30 years at least. Many dealers that started with us are still with us today, and at least over the last 10 years, by and large the core of the top 90 percent of those dealers are still with us.

As I mentioned, 10 years ago we began to do some things such as a policy, a dealer council, contracts, et cetera, which were a direct response to problems that we saw between ourselves and dealers, and we took the position that if we would lead in this regard, that even though we were a smaller company in our industry, we could influence the industry for good, No. 1; No. 2, competitively advantage ourselves. And that is exactly why we entered into contractual arrangements. That is why we started a dealer advisory council. That is why we show them new products and programs, et cetera, before we ever introduce them.

And so our response here has been one of trying to competitively advantage ourselves in that situation, and that is our contention with regard to this litigation.

We feel that our ongoing work with dealers will be more competitive in the future because we are not only looking at legislation like this; we are also looking at competitive realities in our marketplace where dealers are being bought up by conglomerates, and therefore, their bargaining power with the so-called big giants has been brought to par, and in some cases, far above even the manufacturers they negotiate with. That all has a bearing on what kind of a dealer strategy we are going to pursue in the future.

It is of such magnitude that Herman Miller in this last week just announced the appointment of a vice president of distribution just to address these very problems that we see occurring which we think manufacturers are going to have to pay attention to.

Senator KASTEN. Thank you, Mr. Pratt.

Mr. Eizenstat, I think it was Mr. Richard Nelson, but one of the members of the last panel suggested a number of changes to S. 286 which, among other things, would make the dealer subject to a comparable good faith requirement.

Are you familiar in detail with any of the suggestions that he enumerated, and have you or the others had an opportunity to examine those suggestions as to how they might affect this legislation?

Mr. EIZENSTAT. Mr. Chairman, these are suggestions we have not yet had the opportunity to look at as part of the ever-changing nature of this bill. However, from what he said, I would like to make the following comments about it.

First, there is still the requirement for a timely delivery of product. That is often beyond a supplier or manufacturer's control, Mr. Chairman, because it depends on components parts suppliers, on subcontractors, and on market conditions elsewhere.

Second, it does not in any way deal with the basic structural problem of the bill which is that it attempts through Federal edict to restructure an entire relationship governed now by the market.

And third, to illustrate the difficulty of this ever-changing nature, the suggestion they make that parts and supplies ought to be provided on a 5-year basis means in effect that the dealer is mandating to the supplier that he has a right to get goods and parts for a longer period of time than the supplier may wish to supply them, because of factors such as the nonpayment of bills. This would obligate a supplier in effect to continue to supply parts even if the dealer is not paying his bills on a timely basis and is not otherwise performing.

That is why it is so difficult to legislate in this very dynamic area. The issue of parts has been, we think, adequately addressed in the sense that parts are available in two ways. Parts are available first in that many manufacturers supply them at wholesale dealer prices to dealers, terminated dealers, repairmen, anyone who services their product, they will supply those parts on a nondiscriminatory basis. And second, there is a very active aftermarket in parts.

I have a catalog, for example, that shows a Katon Co. that sells the products of many manufacturers at wholesale and sometimes at below the cost that the supplier himself can supply it.

Senator KASTEN. Thank you for your response. The committee would appreciate it, if possible, a more detailed response to the two or three different suggestions that I believe Mr. Nelson was making.

Mr. EIZENSTAT. As soon as we see them, we would be more than happy to.

Senator KASTEN. Mr. Lautenbach, you suggested toward the end of your testimony that in fact it was going to be emerging, new American manufacturers that would be most hurt by this legislation. On the other hand, the proponents of the legislation have suggested that it is aimed primarily at foreign manufacturers, and particularly larger foreign manufacturers.

Could you further amplify your assertion that it would be American manufacturers that would be most hurt by this legislation?

Mr. LAUTENBACH. Yes, sir.

Let me take a part of the office equipment industry that really was not addressed yet this morning, and that is the whole area of personal or microcomputers that we all see blossoming and burgeoning. If you look at the entrants today in the United States in that industry, which is a multibillion dollar market today, it is populated mostly by new, high tech companies that most of us did not hear about 5 years ago, companies like Apple, companies like Compact, Columbia, Fortune, Osborne, and Zenith. These companies by and large need to have a dealer network that is efficient and low cost to sell their products, and if the dealer network becomes an expensive way to distribute products, they are not going to be able

to compete with other manufaturers, not only U.S. companies, but Japanese companies.

And Japanese companies will establish their product and their financial viability in Japan and then come to the United States to market, well armed to market and compete here. Our small companies have to develop their marketplace, their financial strength in the United States before they can go outside the United States and be strong.

So we have to have a low cost, efficient way of distributing products for these small manufacturers in the States. And that is why we think that if it becomes a very expensive way to market—and it will be with this kind of legislation—they are going to be hard pressed to compete with the IBM's, the DEC's, and the Wangs of the world who have other alternatives.

Senator KASTEN. Senator Exon.

Senator EXON. Thank you, Mr. Chairman.

Gentlemen, thank you very much for being here today and giving your input on this.

Let me clear up one or two items, if I can.

Despite the testimony, I would hope that you would realize and recognize that the bill was not intended, nor does it provide for, protection for a dealer who does not pay his bills. Now, that flag has been raised, and I suppose lawyers could argue over it. We have worked very hard on this bill for the last 2 years trying to come up with some kind of a workable bill that would correct the abuses that are out there, whether you gentlemen think they are or not.

Mr. Pratt, thank you for the input that we have had from Herman Miller over the past 2 years. You are the only member of this panel that has come to our office or previously testified. The rest of you I am seeing for the first time.

There is nothing wrong with that except that we have had the line out for people to come in and make comments and suggestions as to how this act could be improved. I take it, then, that there is no way that the rest of you here on this panel, or all of you, for that matter, are going to agree that anything should be enacted in this area. You are entitled to that position.

But I think we should make it clear that—correct me if I am wrong—but I suggest that your thought is that we need nothing in this area regardless of any changes.

Mr. Pratt, you were here a year ago and testified, and I was there, and you brought up the matter of desks and furniture. I agreed at that time that desks and furniture are not machines and do not need service, and the basic thrust of this act is the business of providing service, important services, to consumers who need the machines working.

A desk drawer might not open, but it still is in service.

So we attempted to address Herman Miller's concern basically as a result of you coming last year, and I thank you for that, and I think you agree that office furniture is not covered in the bill.

You brought up something else today that you were now designing equipment in the whole complicated high-tech area, possibly, to be used with furniture. You will note in the bill that we included the elimination of furniture and one other item that we thought

addressed your concern here, and that was furnished designed specifically for integrated use with office machines.

Evidently you do not think that is good enough, and I respect your rights to oppose the bill.

We went out of our way, I think you know, to overcome the objections of Herman Miller because we did not think furniture should be included, but because of the very thrust of the bill.

Now, if I can, let me try and bring out some other things as to why we have worked so very hard to try to come up with something fair. It has been denounced by all of you today as a bill evidently that was ill-founded, not necessary, and it might be, and you are entitled to your opinion.

Mr. McArthur, I have known you for a long, long time, I guess 20 or 25 years. We have had an excellent relationship, and when I was in the industry I had an excellent relationship with 3M, going back to those very early days, and our relationship was always positive, it was good. Like any relationship between a manufacturer and a dealer, there were some differences of opinion, but we always worked them out.

In fact, I want to tell you and the other members of this panel when John Kuchta and my friend and former competitor from Lincoln, Nebr., first came in to see me about this bill, I questioned whether or not such legislation was necessary. I said yes. I know there were some times in all those years when we had some midunderstandings with the individual suppliers, but I felt we were always able to work them out. It was only after I investigated, it was only after I became convinced that essentially because of the foreign manufacturers coming into the business and the fact that they were not following the same principles, basically, as did most of the major American manufacturers, that I agreed to introduce this legislation.

Tell us, if you will, Mr. McArthur, what is the 3M line of approach when you find it necessary to cancel out a dealer or change? I know you have great experience; 80 percent of those dealers are still with you. I know that. I know most of them personally. I know the relationship. I was a member of that dealer council when it was first formed.

We had some problems with 3M, but we got together and worked them out.

But of those 20 percent of those dealers that you have changed, how do you go about doing that?

Mr. MCARTHUR. We basically have negotiated with them, but the basic thing, we will buy back all of their inventory at the prices that they——

Senator EXON. I want to get this in the record. You will buy back all of their inventory, correct?

Mr. MCARTHUR. Yes, at the prices that we sold it to them.

Senator EXON. Correct.

Mr. MCARTHUR. We will allow them to finish out their GMA's, even though they have collected the money and we or somebody else would service the machines.

If the dealer—and this would be very rare, and it would only be temporary in most cases—but if a dealer had machines out on rental or something that he has sold, we will supply the parts at

that dealer cost as long as he has machines in that marketplace. But it does not take very long for these to move out, other machines get in and so forth.

We basically are most concerned about our relationship with the customers, and therefore, it just behooves us to make an amenable deal when we are forced to terminate dealers, although that is very rare.

Senator EXON. Is it not also true, Mr. McArthur, that you generally do pay something for good will, blue sky?

Mr. MCARTHUR. In the earlier contracts in some of those dealerships that were signed up very early, we agreed to pay 1 year's profits, the previous year's profits, but that is not the case any longer. Those are those particular deals, and today when the good will comes up, it is a negotiated point. And there is no principle set or any procedure like we had in those original contracts for good will.

Senator EXON. How many terminations of contracts have you had under a disputed basis where you did not pay blue sky? Very few, I suspect. You have always paid something, have you not, for the most part?

Mr. MCARTHUR. For the most part, yes, but a very small—the number of dealers that would be terminated would be very rare indeed, a very small number, although that is in the office equipment field.

I do want to go on record that in the total company where the office supplies and all of these, I am not truly aware of how many dealers they might have.

Senator EXON. Again, we are not talking about sandpaper. We are talking about office machines basically, something, a product that will break down, not designed to, but it will break down.

Mr. Chairman, the reason I followed this line of questioning was that when this problem came up, I told them that I had had the long-time experience with a main company in America like 3M, and I thought for the most part that I did not know of any unfairness. And I felt that if we could pattern a bill that basically followed the good will line and the responsibility of both the dealer and the manufacturer that 3M had always had, that I would be glad to introduce it.

The bill that is before us that you are opposing is basically a bill that was built upon the basic understanding and relationship of good faith between a prime manufacturer like 3M and their quality dealer organization. I suppose if I were a manufacturer, I might not want anything like this.

I just want to assure you, Mr. McArthur, that this bill basically is patterned after the favorable relationship that has existed for maybe 20 or 25 years between the 3M Co. and their dealers, but you still oppose it.

Mr. MCARTHUR. Yes.

Senator EXON. Why, Mr. McArthur?

Mr. MCARTHUR. I think it is more than just 3M. I think the rest of the industry, I really believe we should encourage small, high tech companies to flower in America. I think we need more manufacturing back in America and this type of thing.

But it is not only on the basis of 3M. I think it is for the industry as well. Unfortunately, there may be some dealers, suppliers that do not handle their dealers the same way 3M does, but I think for the most part that they can and will as time goes on. The marketplace is going to force them to do that.

Senator EXON. Now, Mr. McArthur, you are very well founded in the business.

Are you testifying that you really believe that for the most part most of the foreign manufacturers have treated their dealers fairly? You are in competition with foreign manufacturers.

Mr. MCARTHUR. Yes, we are, and of course, with the foreign competition we have to be very competitive.

I personally do not know manufacturers' policies in great detail. We have never really worried about their policies as much as just competing with them.

Senator EXON. And you do not remember any instance where in your dealer meetings or your visitations, because I know you visit your dealers, where they have told you of instances where they have had difficulty with foreign suppliers not backing up their machines, and the difficulty that they have as 3M always did with us?

You remember a time or two, do you not, when there was a clunker that 3M gave us, but there were a few, and 3M was always there, were they not?

Mr. MCARTHUR. Yes.

Senator EXON. They did not just say to Jim Exon, OK, this is your problem, Jim. They were always right there to say OK, this machine has not performed exactly as we thought, and you backed it up.

You must have heard something, have you not, about that particular attitude not being followed primarily by foreign manufacturers?

Mr. MCARTHUR. I think 2 or 3 years ago we heard a small amount of it, but realized not many of our dealers were carrying foreign manufactured machines. Some of them are now.

We heard some of it, and of course, there was some press on that, if you remember, at the time.

I do not think that this is as prevalent today as it was then, but at least I do not hear as much about it ask it was 2, 3, 4 years ago.

Mr. EIZENSTAT. Senator, may I just respond to that question as well very briefly?

Senator EXON. Certainly.

Mr. EIZENSTAT. Our basic point is that this is such a vibrant and competitive marketplace that if foreign companies as well as any domestic companies were on any pervasive basis continuing to practice these sorts of abuses which have been alleged, they would be cutting their own throat. Dealers would move away from them to other manufacturers who would not be engaging in those practices, and therefore the marketplace, because it is so competitive, is a corrective and is in fact correcting, as Mr. McArthur indicated, whatever abuses may have occurred. And it is for that reason that Mr. Goldberg's statement, which I would like, with your permission and the chairman's, to put into the record, is so instructive because he talks about the degree to which the market has changed and talks about the fact that the lessons of the 1970's where there were

confrontations, particularly in the copier segment, have been largely corrected, and as he said, most manufacturers have learned a valuable lesson.

Senator KASTEN. That is Mr. Goldberg's statement to us here?

Mr. EIZENSTAT. It is quite different from Mr. Goldberg's statement to you. This is a statement in the NOMDA Spokesman of July 1983, his "Ask the Attorney" column, in which he talks about the wide choices that dealers have in choosing among and between manufacturers, and the marked changes, both legally and in the marketplace which give dealers the option to choose among and between those suppliers who are offering good contracts and those who are not.

Senator KASTEN. You do not mean Mr. Goldberg's statement, you mean Mr. Goldberg's published article?

Mr. EIZENSTAT. It is a published article.

Senator KASTEN. Without objection, that will be included as part of the record.

[The following information was subsequently received for the record:]

ASK THE ATTORNEY

(By Robert C. Goldberg, NOMDA General Counsel)

Question. Dear Mr. Goldberg, how do I select my suppliers? (A frequently asked question.)

Answer. While attending Convention, dealers are afforded the oportunity to expand their product lines and hopefully, increase sales and profits. With all the computer entrants and changes in distribution of traditional product lines, a dealer is presented with many opportunities. Certainly the selection of a supplier involves legal considerations, but more importantly, a business judgment must be made. In all my negotiations with manufacturers, one word more than any stands out and that is—ATTITUDE. It is in negotiating with a supplier that the true intent or attitude of a manufacturer quickly surfaces.

Entering into a relationship with a supplier should be slow and deliberate. A dealer must attempt to learn all he can prior to consummating the realtionship with a written contract. Taking on a new supplier is akin to starting a new business. There is investment in product, parts, training, and promotion. If you fail with this endeavor, then a portion of your business has failed. Sure, successful lines can make up for this segment's failure, but that lowers profits. It's worth it to take the time and invest your attention to eliminate these failures.

Confrontation between suppliers and dealers in the 1970's involved product failures and unfair contracts. This fact was particularly true in the copier segment. Manufacturers rushed to capture market share of copier sales. Product innovation moved at an incredible pace. Often the printed promotional piece for a product described capabilities for a machine which, in fact, did not exist. In addition, a manufacturer had to get his new product into the marketplace while it was still "new" in order to recoup his investment in research and development. The results were disastrous for dealers and end-users.

Manufacturers, well aware that products were being released to dealers without proper field testing, had to protect themselves with contracts which stripped dealers of their normal rights. Despite such efforts, frustrated end-users and dealers sued manufacturers for the problems experienced with their faulty equipment. In some instances these actions were successful. The lesson of the 1970's for manufacturers was that they must deliver reliable equipment and promote it accurately to the dealer and end-user. Most have learned this valuable lesson.

The 1980's present the dealer with the opportunity to sell reliable equipment. So dealers have turned from product confrontation to seeking contracts which establish a balanced relationship. This, coupled with significant changes in the law, has presented the dealer with an opportunity to exist under a dealer contract which can become an asset to his business. Unfortunately, suppliers have been slow to recognize the advantages of a good, fair, and equitable dealer contract.

NOMDA, on behalf of its members, regularly negotiates with manufacturers for contracts which contain four basic requirements. (1) Fair and equitable treatment among the manufacturer, dealer, and end-user in all facets of the relationship; (2) Mutually agreed upon quotas that are realistic and attainable; (3) An open-ended term of the agreement that assures if you pay your bills and meet your quota, you will remain the manufacturer's representative forever; and (4) An inexpensive NOMDA Appeal Board process for the resolution of any disputes. These requirements are not outrageous, however, it is important to share what a manufacturer reveals in negotiating for these terms. It is through this courtship that the true attitude of the supplier is determined.

There are numerous manufacturers operating with NOMDA-approved agreements. They have grown and prospered through a loyal and dedicated dealer network. Systel, in the last two years, has grown from zero to almost four hundred dealers through a contract that states "fair and equitable" and a management attitude which conveys the same. Hermes recently developed a new program which is designed to meet dealer needs—not Hermes' wants. Victor has recruited loyal follows by working with its Dealer Council and other experts to develop a fair and equitable relationship. Royal has taken what only can charitable be described as a strained relationship with its dealers, and turned it around to create a concept with momentum and trust. Canon, in addition to stating its fair and equitable intent, has, through its new copier contract, joined other dedicated manufacturers to eliminate the grey market for their products. Steps like these can only serve to make manufacturers and dealers stronger, and thus insure greater end-user satisfaction.

Why are all these examples noteworthy? Not once after a manufacturer has adopted the Model Dealer Agreement has NOMDA been advised that it was not in the manufacturer's interest to have done so, or that there had been any adverse results through its issuance. On the contrary, manufacturer has stated that it was the best thing they had ever done. One comment stands out more than any. When a manufacturer was requested to testify before Congress regarding the use of the Model Dealer Agreement, the response was, "My use of the Model Dealer Agreement is a competitive advantage which I do not wish to advertise."

Clearly, manufacturers issuing fair and equitable agreements have demonstrated the proper attitude and deserve your consideration during Convention. Their courtship has been completed and a marriage is proper. On the other end of the spectrum is a supplier who issues a one-sided contract and refuses to negotiate. From a legal standpoint, I must suggest extreme caution. From a business standpoint, you must open your eyes wide, weigh the pluses and minuses, and then make your own decision.

Far more perplexing are those suppliers who want to be good guys but just are not ready to commit their attitude to writing. Recently, NOMDA met with Minolta to discuss their new dealer agreement. Representatives from Minolta stated unequivocally their intention to treat their dealers fairly and equitably; however, they were not prepared to make this part of their dealer contract. Although I believe Minolta's intentions are honorable, it is clear that if a dispute develops, they want it resolved according to their contract terms.

How do you choose a supplier? Simple, do your homework. Question other dealers about their experience with the product and management. Spend time with as many representatives from the company as possible to obtain information on which to base your decision. Ask the representatives similar questions to find out if individual or company policy is being stated. Verify the representations with other dealers. Enter negotiations regarding their contract. Call Rachel Lopez (312-444-1024), NOMDA's Legal Assistant, and request a copy of the legal analysis of the company's contract. Most importantly, take your time; there is no need to rush into any relationship. Once you determine their attitude, you will know if the relationship is appropriate for your business.

NATIONAL OFFICE MACHINE DEALERS ASSOCIATION,
Wood Dale, Ill., September 28, 1983.

Senator ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Russell Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: On September 14, 1983, the Consumer Subcommittee, under your able leadership, held hearings on the Office Machine and Equipment Dealers Act, S. 286. These hearings afforded those testifying an opportunity to express their views along with the bases for their respective positions. The very able participants utilized the democratic process consistent with its intent. Unfortunately, one of the witnesses was not forthright in certain facts presented.

There is an old saying among trial lawyers that if you are not strong on the issues, then attack the players. Perhaps Mr. Eizenstat, in comparing my article in the July issue of the NOMDA Spokesman to my written submission to the Subcommittee, was practicing this adage. One thing is clear though; Mr. Eizenstat was not honest to the Subcommittee in his presentation.

The article in question guided an office products dealer as to how he should consider selecting suppliers. As you will note, the advice suggests that in the 1970's a dealer had to be concerned with product reliability. My written remarks to the Subcommittee discuss reliability problems in terms of the three "C's"—Calculators, Copiers, Computers—and how reliability problems have appeared during each of these product introductions. The Spokesman article then suggests that during the 1980's a dealer should seek contracts which establish a balanced relationship",—the very foundation of the Office Machine and Equipment Dealers Act. A full reading of the article expresses how manufacturers shield themselves from liability for unreliable products through one-sided contracts. Fair agreements would eliminate this protection and thus, require manufacturers to deliver products according to specifications. S. 286 provides that balance.

My positions on behalf of the small independent office products dealers have always remained consistent. Their difficulties and pursuit of fairness grow more pressing day by day. In the 80's dealers seek a balanced industry through fair contracts and the passage of S. 286. With your help, these objectives will become a reality.

Very truly yours,

ROBERT C. GOLDBERG.

Senator EXON. Mr. Lautenbach, what percentage of the total electric typewriter business in the United States does IBM have?

Mr. LAUTENBACH. It would be an estimate, Senator. That is a question fraught with problems. I would estimate about half.

Senator EXON. Would you submit it for the record?

The facts of the matter are the major supplier of electric typewriters in the American market, are you not?

Mr. LAUTENBACH. I think that is fair.

Senator EXON. What percentage of those typewriters have been sold through independent dealer organizations, very little, I presume?

It has been basically through your own sales organization, is that right?

Mr. LAUTENBACH. It has been through our own sales organization, but recently a very healthy percentage are being sold through dealers, and we plan to increase the dealer percentage dramatically.

Senator EXON. One final question of the panel, Mr. Chairman, and I again appreciate your testimony.

Do any of you see how we might be able to address the problem that some of us envision out there today, especially with foreign manufacturers, and I say once again that despite what you think, it was designed primarily for the abuses by foreign manufacturers. As I said in my opening statement, we originally drew this bill for foreign manufacturers, and we could not because of the constitutional problem.

I therefore agree that it does cover a whole series of areas where you have concerns.

With that in mind, do any of you see any way that we could have any kind of an act that would be acceptable to you, or is it your bottom line that you do not believe we should have any Federal legislation in this area at all?

Mr. EIZENSTAT. Sir, if I may respond to that, we certainly are continuing to be willing to look at the changes that have been pro-

posed, including those to date, but our basic feeling is that we are dealing with what is a healthy competitive market in which dealers have a wide variety of choices among manufacturers who are very anxious to get shelf space for their products, and that this type of legislation, this generic type of legislation, whatever minor modifications there may be, will make a competitive market less competitive, to the disadvantage of suppliers and dealers trying to get in, as well as consumers.

So we have really difficulty seeing ways in which this type of legislation can be fashioned to correct the very basic structural problems we see with the legislation.

Senator EXON. Have you made any suggestions to us or staff as to changes that could be made previously, Mr. Eizenstat?

Mr. EIZENSTAT. I have not been asked to, Senator, but we certainly would be willing, in response to any request you have, to comment on changes.

Senator EXON. Well, if you were not asked to, you are familiar, are you not, that we have been holding extensive hearings on this, and I think the word has been out very loud and very clear that we wanted input. I wish that we could have had it earlier.

I invite you, Mr. Eizenstat, and the people that you represent, and all the rest of you, to make suggested changes because there is no pride of authorship here. It is an idea that whether you think it is out there or not, there are some of us who believe there are some abuses going on today, and we are trying to address it.

Mr. Pratt.

Mr. PRATT. Senator Exon, we obviously have attempted to suggest some changes to your office and so forth, and I speak for myself now as opposed to just BIFMA, et cetera. I personally oppose Federal legislation in places where I think that market forces can help us. If we were to go back to the example of the guy playing marbles for 1 minute, I too have played marbles in the middle of the Ozarks, in fact, in the dirt in front of the courthouse in Hartville, Mo., which is in the middle of the Ozarks. But it would be analogous to having the city council set the rules on how myself and another kid are going to play marbles.

And it seems to me that we do a lot better when we have a good, healthy, competitive environment to get together and decide how we are going to do business together, and if we do not do business well together, we do not last long and we do not build the reputation that we have.

And in light of the foreign competition, all of us are involved in foreign business, or most of us are involved in some sort of foreign business, and we like the whole idea of reciprocal kinds of attitudes. It is anathema to our spirit to even think about closing up our free market. We would be a lot better just to get smarter in terms of the guys we play marbles with.

And for us, it seems to me that unless there are gross injustices which government does have to address, then, I think it is not worth our time to try and develop legislation for what appears to be a bit more minor than major.

Senator EXON. I interpret your statement then that you are not for repeal of the Sherman Antitrust Act. You think maybe some things like that the Federal Government has a right to be in.

Mr. PRATT. To address gross injustices.

Senator EXON. I know of no abuses that have been called to my attention as far as Herman Miller is concerned. You are a high quality, very competitive manufacturer.

Once again, I would say in closing, Mr. Chairman, thank you for your testimony. I would hope that you at least would have an understanding that we are not trying to eliminate the free enterprise system, we are trying to keep an important segment of the free enterprise system, the small office machine dealer, in business. That is the reason for the act.

I take it, though, the bottom line is that you would oppose anything. That is your right, and I appreciate your stand in that area.

Thank you very much.

[The following information was subsequently received for the record:]

POWELL, GOLDSTEIN, FRAZER & MURPHY,
Washington, D.C., December 16, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, Hart Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed please find answers to the post-hearing questions submitted by you and by Senator Riegle to the Coalition for Competition or to representatives of the Coalition who testified on September 14, 1983.

I trust that you and your staff will find our answers both responsive and complete. Permit me to call your attention to our answer to question 5 regarding the changes to S. 286 proposed by NOMDA. The only ones to which we can now respond are those which were presented by Mr. Nelson of NOMDA in his oral testimony.

As our responses to your questions were being readied to be forwarded to you, we were informed that NOMDA had submitted to the Subcommittee a complete redraft of S. 286.

From the very cursory review that, under the circumstances, we have been able to give NOMDA's newest bill, it appears to include numerous amendments not mentioned in NOMDA's September 14 testimony. Precisely how many changes are included in it is difficult to ascertain on a first reading, since some of the revisions have not been underlined. However, it can be said that some of these changes appear to restore some of the grossly anticompetitive provisions from the antecedents of this legislation considered in the 97th Congress. Without question, NOMDA's most recent bill raises a host of major issues that were not, and of course could not be, addressed in the Subcommittee's September 14 hearing or in our enclosed answers.

On behalf of our Coalition, I am grateful for the courtesy you and your staff have extended to us and the interest demonstrated in our position.

Sincerely yours,

STUART E. EIZENSTAT,
Counsel for the Coalition for Competition.

Enclosure.

Question. How many manufacturers are there serving the U.S. market in each product line? Are some of them small manufacturers? Are some manufacturers innovators in the industry? New entrants?

Answer. A genuine revolution is rapidly transforming the office workplace. Two phenomena, the search for productivity, and the advance of information technology, are driving this revolution. An explosion of new office products to satisfy this market, designed and predominantly produced by innovative U.S. firms, has reached such proportions that in many areas the distribution system cannot absorb the available products. Suppliers face severe bottlenecks in getting their products to market.

Given this expanding market and the breadth and vagueness of the bill itself (the bill covers all "suppliers" of "office products"), it is difficult to forecast how many different types of enterprises could be swept by the courts within the reach of these broad and vague terms. The office equipment sector is so dynamic that data on the number of participants in particular product lines often becomes obsolete as it is being collected, and whole new product lines are continually springing up. Office

work stations are a good example of this phenomenon. Definitions of what constitutes particular product lines quickly lose their relevance to technological or market-place conditions. Finally, and most importantly, it should be noted that this question and testimony offered by the National Office Machine Dealers Association (NOMDA), refers to information concerning "manufacturers," while the language of S. 286 applies to a much broader category—"suppliers."

Bearing in mind the above caveats, the Coalition has attempted to provide for the Subcommitte rough but meaningful responses to Chairman Kasten's questions based on reliable and publicly available information. The results are depicted graphically in a series of tables and elaborated below. Briefly, highlights include:

Over 4,000 hardware and software firms produce products covered by S. 286, and will thus be impacted by its restrictions.

The overwhelming majority of these firms are American, not foreign (and not U.S. subsidiaries or divisions of foreign firms). In the eleven major product-areas on which the Coalition secured data, U.S. manufacturers supply a majority of the market in all cases, measured by the value of units shipped (in 1982), and in seven areas, the most technology-intensive areas, U.S. firms account for at least 95 percent of the market.

Competition is vigorous in all of these markets, and small firms play a significant competitive role in most of them. Of 127 companies that advertised for dealer shelf-space in the May 1983 issue of Computer Merchandising, a trade publication aimed at office equipment dealers, 80.7 percent have less than $25 million in sales annually, 69.8 percent have less than $10 million, and 52.6 percent have less than $6 million.

The pace of innovation is startling and on the increase. In three areas—computers, work stations, and typewriters—there were a total of 90 new product announcements in 1978, and 265 new product announcements in the first six months of 1983. (U.S. manufacturers produced 89 percent of these innovative new products.)

New entry is similarly dramatic. In the field of computer software, for example, which is expected to grow from $1 billion in sales in 1982 to $7.9 billion in 1987, there are now approximately 350 "established" companies, of which most were not in existence three years ago and many have been growing at rates of 100 percent or even 200 percent per year.

THE VAST NUMBER OF OFFICE PRODUCT MANUFACTURERS

Because of the breadth of products potentially covered by the Office Machine and Equipment Dealers Act, the information presented here was derived from a variety of industry and government sources. The sources are indicated. Not all suppliers distribute through dealers. Data from the U.S. Department of Commerce reflects numbers of U.S. manufacturers only.

A partial list of product-areas is shown in Table I. We estimate there are approximately 4000 hardware and software suppliers serving the U.S. market. The majority of these suppliers are U.S. firms (not subsidiaries or divisions of foreign manufacturers) and U.S. firms supply the major share of the U.S. market. Most of these U.S. manufacturers, particularly in the technology sensitive product areas such as office work stations, computers and software, are innovators. Many are small and many are new entrants.

The number of manufacturers in ten of the major product areas is shown in Table II. Table III shows the number of manufacturers in product subsets of office systems, small computers, and software and shows the number of products in each product sub-set. The number of suppliers in various product categories are not additive because some suppliers manufacture products in more than one category. We believe this data is quite conservative. For example, while we estimate there are at least 600 suppliers of computers and related equipment, Data Sources lists almost 600 vendors of more than 2000 computers alone. At COMDEX, a recent U.S. trade show of personal computer products, there were 1400 exhibitors of computers, software and related products.

THE PREDOMINANCE OF AMERICAN FIRMS

Table IV shows the very small percent of the U.S. market supplied by Japanese manufacturers in twelve product areas as measured by the dollar value of units shipped in 1982. U.S. manufacturers supply the majority of the market in all cases and in seven areas, the most technology intensive, U.S. manufacturers account for at least 95 percent of the U.S. Market—general purpose computers, small computers, mini-computers, desktop computers, word processors, software, and terminals.

THE PREDOMINANCE OF SMALL FIRMS

There are many small manufacturers serving this market. By way of example we refer to the September 14, 1983, statement of Mr. A. G. W. Biddle before the subcommittee:

"In an attempt to provide the Members of this Committee with some quantification of this enormous disparity, we analyzed the 127 companies who comprise the List of Advertisers on page 271 of the May, 1983 issue of Computer Merchandising, a publication directed towards an audience of computer and office equipment dealers. A chart depicting the relative size of these suppliers seeking dealer relationships appears below. Included within those firms shown as 'under $5 million' are numerous new entrants who are still privately held and too small to be listed in any standard industry reference source. It is interesting to note overall that 52.6 percent of the listed suppliers are smaller than $5 million in annual revenues, 69.8 percent are smaller than $10 million in annual revenues, and 80.7 percent are under $25 million annually."

These figures are graphically shown in Table V.

ENTRY INTO THE SOFTWARE INDUSTRY

With the rise of the personal computer, a new, exciting software industry has developed. Microcomputer software companies are predominantly less than three years old. Many of these firms are small in size but growing very rapidly. In fact, growth rates of over 100 percent are not uncommon; a significant percent have averaged over 200 percent per year. In total, there are over 350 established microcomputer software publishing companies. These firms publish software for some 5,000 software authors. In addition 2,000 software authors publish independently.

Some of the major companies in this field include: Visicorp ("VisiCalc") Microsoft ("Basic"), Lotus Development Corporation ("1-2-3"), MicroPro ("Work Star"), Software Arts, Ashton-Tate, and Digital Research. These small businesses provide state-of-the-art software and are on the cutting edge of technological development.

A conservative analysis of the industry forecasts that the software market, primarily microcomputer software, will increase from $1 billion in 1982 to $7.9 billion in 1987. Thus, the industry will have a compound growth rate exceeding 50 percent during that same period. Beyond 1987, the growth rate of microcomputer companies may be expected to continue at an increasing rate. Importantly, most microcomputer software is market through dealers.

THE PACE OF INNOVATION

Continuous innovation marks all major product areas. Current U.S. technological advances in microcomputers and software have given rise to the concept of the "work station." "Work stations" are, simply stated, things that sit on a desk, plug into a wall, and provide the means for increased office worker productivity. Work stations combine the data entry, word processing, storage, retrieval and transmission capabilities of computers with the more traditional functions of key boarding (typewriters) and document reproduction (copying).

Taking computers, work stations, and typewriters as a group, there were 90 new product announcements in 1978. There were 265 new products announced in the first 6 months of 1983, 215 in work stations, and in comparison only 10 for typewriters. U.S. manfacturers produced 89 percent of these new products. (These developments are graphically depicted in Tables VI and VII.) Three times as many work stations product as typewriters were shipped in 1982. While shipment of typewriters are remaining constant and may even be declining, the sales growth of work stations is expected to grow vigorously.

This unprecedented revolution of innovative products has been overwhelmingly the product of U.S. industry, and, significantly, of small U.S. manufacturers, half of which did not exist 6 years ago.

TABLE I.—PARTIAL LISTING OF MAJOR "OFFICE PRODUCT" CATEGORIES COVERED BY S. 286, AS INTRODUCED

Accounting and Adding Machines
Addressing Machines
Advance Scanning Devices
Audio Visual Equipment, Accessories
Autographic Registers
Automatic Testing Equipment
Binding Equipment and Machines
Bookkeeping Systems and Devices
Boxes, Locking and Automatic Sort
Broadcasting Equipment and Systems
Calculators
Calendars—Mechanical and Electric
Cash Drawers
Cash Registers (Electronic)

Check Protector/Checkwriters
Coin Handling Machines, Coin Wrappers—Mechanical and Electrical
Collating, Sorting, and Folding Equipment
Commercial Stapling and Fastening Devices
Communications Devices—Internal and Intercom
Composing Machines
Computer Hardware
Computer Peripherals
Computer Software
Computer/Typewriter Interfaces
Data Processing Equipment
Dictating Equipment
Drafting Equipment
Duplicating Machines and Supplies
Electronic Test and Measurement Instruments
Embossing Machine Systems and Sealers
Facsimile Input/Output Support Devices
Forms—Handling Devices
Imprinting, Numbering, and Dating Machines
Lettering Systems
Lighting Systems
Magnetic Media—Storage and Drives
Magnifiers, Readers, and Printers
Mail Handling and Equipment
Message Filing and Distribution—Automatic
Microfilm Equipment
Multifunction Workstations and Systems
Optical Discs—Machinery
Paper Cutters
Paper Handling Products
Photo Composition Equipment
Photocopying Equipment
Printer—Multifunctional
Printing and Engraving Devices
Process Control Equipment and Systems
Recorders—Repeater Systems
Scales—Electical and Mechanical
Scan Card Systems
Shredders
Specialty Locks, Hardware, Key Control Systems
Stand-Alone-Word-Processing Systems
Storage and Retrieval Systems
Telephone Accessories and Amplifiers
Telephone Answering Devices
Time Clocks and Time Stamping Equipment
Typewriters and Accessory Equipment
Video Conferencing—Internal Equipment and Accessories
Video Terminals and Displays
Visual Aids
Word Processing Equipment and Systems
Wrapping Equipment

TABLE II.—NUMBER OF MAJOR MANUFACTURERS BY PRINCIPAL PRODUCT AREA

Product area	Number of manufacturers
Computer and related equipment	[1] 600
Software products	[1] 350
Calculating machines	[2] 40
Cash registers, accounting, bookkeeping and billing machines	[3] 22
Office copying equipment	[2] 41
Duplicating machines (not copy)	[3] 10
Word processing equipment	[2] 65
Typewriters, dictating, et cetera	[3] 71
Facsimile equipment	[2] 17
Mailing, letter handling and addressing machines	[3] 34

[1] See table III.
[2] Computer and Business Equipment Manufacturers Association.
[3] "Current Industrial Reports", Census of U.S. Manufacturers, U.S. Department of Commerce.

TABLE III

Product category	Number of manufacturers	Number of products
Small computers:		
Minicomputers	80	287
Microcomputers:		
High end	63	130
Desk/top personal	216	461
Portable	42	60
Commercial/small business	125	381
Board level/OEM	149	261
Specialized systems	101	288

TABLE III—Continued

Product category	Number of manufacturers	Number of products
Graphic systems	225	781
Printers	210	1,079
Disk drives	230	1,656
Mag tape drives	96	571
Memory systems	144	794
Terminals	437	1,666
Peripheral controllers	285	1,530
Office automation:		
Systems	17	17
Branch exchange systems	24	98
Word processors	+50	+160
Microcomputer [1] software	350	[2] 5,000
Independent authors		[2] 2,000

[1] ADAPSO (authors).

[2] Computer and Business Equipment Manufacturers Association.

Source: Data Sources (R) Winter 1983, Published by Ziff-Davis Publishing Co.

TABLE IV. U.S. INFORMATION PROCESSING INDUSTRY—JAPANESE PARTICIPATION—1982

[Dollar amounts in millions]

	1982 value shipped	1982 Japanese participation (percent)	1982 units shipments
Electronic typewriters	$474	9.4	307,000
Copiers	3,661	35.0	517,000
Terminals [1]	3,665	1.0	1,808,000
Printers [1]	693	26.0	1,234,000
Disks [1]	13,657	10.0	.....
Tape storage [1]	.....	([2])	.....
General purpose	11,780	4.0	9,300
Minicomputers	4,830	1.0	114,700
Small business computers	1,715	1.0	33,375
Desktop computers	4,045	1.6	2,634,000
WP—Standalone	1,504	1.0	196,000
WP—Cluster	580	1.0	([3])
Software	3,910	0	([4])

[1] Amount also counted in processors, except 1/2 terminals.

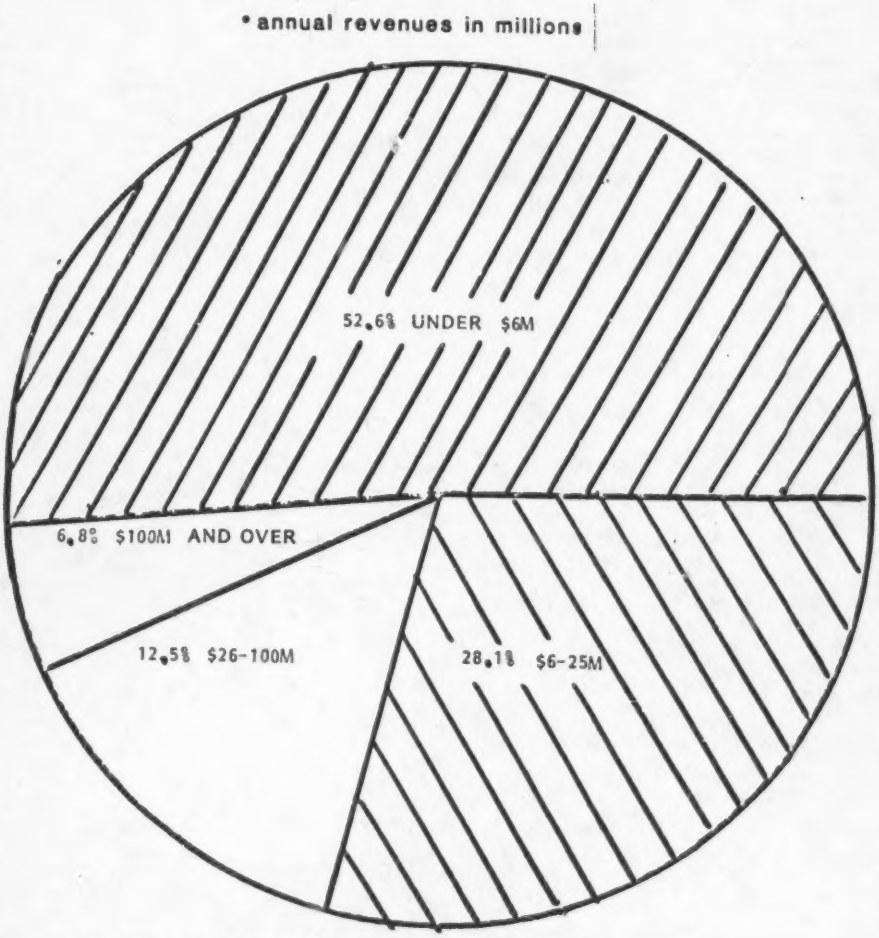
[2] Estimates.

[3] S/A 138K; clustered 58K.

[4] Units (not applicable).

TABLE V

RELATIVE SIZE of MANUFACTURERS SEEKING RETAIL DISTRIBUTION THROUGH COMPUTER DEALERS



Source: advertisers, Computer Merchandising, May 1983
Standard & Poor's, Data Sources, industry reference materials

26-864 094

TABLE VI

NEW PRODUCTS ANNOUNCEMENT VELOCITY 1983 YTD

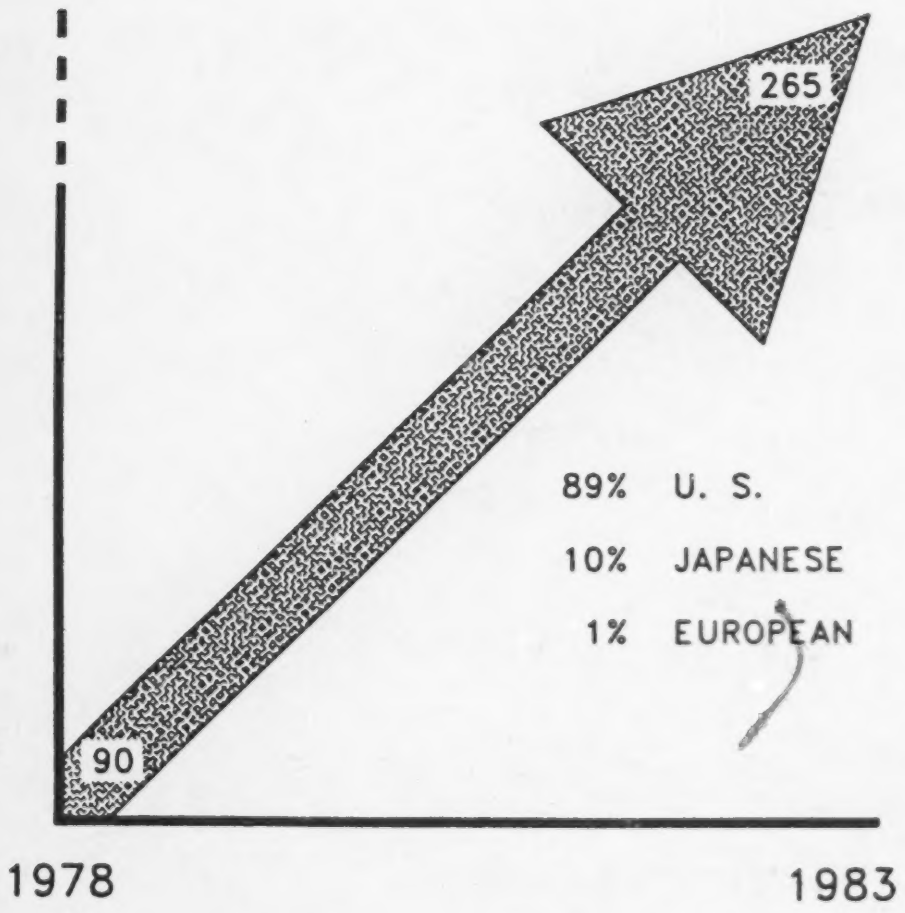


TABLE VII

NEW PRODUCT ANNOUNCEMENTS

1983 YTD TOTAL 265

10

LARGE PROCESSORS

30

INTERMEDIATE SYSTEMS

215

WORK STATION SYSTEMS

10

TYPEWRITERS

Question. Can it occur that there are more manufacturers in a given market trying to sell a given product than there are dealers? Are dealers sometimes larger companies than their suppliers? Is so, what happens in such situations?

Answer. In this explosive sector of the economy, it is frequently the case that there are more manufacturers trying to reach a given market to sell a given product than there are qualified dealers to carry the product. As Dun's Business Monthly reported in August 1983, there are two hundred plus computer manufacturers competing for dealers. It noted that *"Getting shelf space is now the critical factor in survival* [for these manufacturers]". (Emphasis added.) A recent New York Times article of November 30, 1983 reports the problem is compounded by the lack of qualified dealer personnel to help new buyers in selecting the right kinds of products for their needs. A November 30 report in the Washington Post points out that for "thousands of computer software companies . . . there's not a shortage of software. There's a shortage of distribution".

It is not unusual for dealers to be larger than their suppliers. Even if we ignore the national dealers such as Computerland and A-Copy, a subsidiary of Alco Standard, there are small suppliers in most major product areas who often may be smaller than some of their dealers. As pointed out previously, emerging U.S. firms in microcomputers and software are very small. As the Association of Data Processing Service Organizations (ADAPSO) observes:

"In the case of microcomputer software, there are usually several companies trying to market software in the same given area. Competition among the various offerings of these firms is intense. Dealers are not infrequently larger than microcomputer software companies."

However, the salient point to note is that comparative size is not the most important factor in structuring relationships between office product suppliers and dealers. For suppliers, the important factors are limited availability of qualified dealers to market and service their products. For dealers the important factors are quality and market acceptance of suppliers' products and the profit margins likely from handling those products.

While NOMDA incorrectly alleges that its bill, S. 286, is needed to reduce the allegedly excessive market freedom enjoyed by office product suppliers, its representatives are in fact aware of the great leverage conferred on dealers by the tremendous expansion of the number of office products and manufacturers, as well as other suppliers. NOMDA's Counsel, Robert C. Goldberg, in urging NOMDA members to bargain hard with suppliers, noted that [NOMDA Spokesman, p. 14 (July 1983)]:

"With all the computer entrants and changes in distribution of traditional product lines, a dealer is presented with many opportunities."

Since the free market is now creating all these "opportunities" for office product dealers, NOMDA's plea for special protectionist legislation should be rejected.

Question. Please explain why you believe S. 286 will discourage the entry of new manufacturers into the market. Also, why would it discourage the creation of new dealerships?

Answer. There are several reasons why S. 286 will discourage new manufacturers and new dealerships from entering the market. The companies certain to be most directly disadvantaged by the Dealers Act are comparatively small, newly emerging U.S. manufacturers in the high technology office products field who can least afford the additional costs of distribution created by this bill. Small Business Administration Chief Counsel for Advocacy, Frank S. Swain, stated concisely that "the bill would restrict the increasingly abundant business opportunities available as a result of the technological advancements in the office equipment market." A unanimous Federal Trade Commission succinctly stated one of our major concerns when it said that "The bill would create significant barriers to entry where a few now exist."

Specifically, the Dealers Act will block the path of new entrepreneurs in this field both with significant barriers to entry and even more severe competitive disadvantages. It should be remembered that the bill's requirements of advance notice and of compensation for a terminated dealer will, as the FTC noted, "impair the supplier's ability to select the most effective methods of distribution . . . and will impose higher transaction costs" on the parties. These burdens will necessarily fall hardest on the newest and smallest companies least able to bear these higher transaction costs.

As the Federal Trade Commission has observed, "potential new entrants often need independent dealers to establish themselves in a market." They cannot avoid the bill and its costs by integrating forward to set up their own retail outlets. They have much greater difficulty than their larger, established competitors, shouldering the cost and additional record-keeping burdens of fully analyzing the complexities of the bill, keeping tabs on the price of the products at the retail level, reviewing

changing precedents in the Federal courts, bearing the risk of paying attorney's fees, and generally integrating all the changing rules into their marketing plans and dealer relationships. New small firms are uniquely vulnerable to attempts by aggressive dealers to exploit the numerous legal pressure points they are given by the bill. Threats of litigation will be most menacing to these companies.

The entry barriers to new manufacturers will also derive from the incentive large manufacturers will have to deal with a network of large dealers to reduce the burden of dealing with a large number of smaller dealers under this Act, a luxury small suppliers and new manufacturers would not have. Moreover, manufacturers will be encouraged to combine horizontally to market their products, in order to spread the various costs generated by the new legal complexities of distribution.

The Federal Trade Commission also noted the discouragement to entry at the manufacturing level which will result from the fact that the bill "will make it more difficult for suppliers to terminate dealerships, giving existing dealers some degree of market power to raise prices without fear of new entry and increased competition." The Federal Trade Commission noted that suppliers could not "overcome some of these increased barriers" without "substantial cost"—costs that new or small manufacturers have the most difficulty shouldering.

This threat is real. Its gravity is evidenced by the March 9, 1983, letter signed by all members of the Massachusetts delegation, including Speaker of the House O'Neill and both Senators, to Chairman John Dingell of the House Energy and Commerce Committee, urging rejection of the bill because of the harm it would do to the high technology firms that have done so much for the economy of that State. The delegation stated: "What these firms deserve is our strong support, not additional legislative and regulatory hurdles for them to overcome."

Similarly, the Dealers Act would severely curtail the creation of new dealerships. Indeed, the basic purpose of the bill is to prevent suppliers from transferring business from an unsatisfactory dealer to a new one, or from using multiple dealers for the distribution of different product lines. It has always been at the bottom a bill to protect existing dealers from competition. Insofar as the bill will tend to give existing dealers a lock on the business of existing suppliers, including their new products, the obvious—and intended—victim is the potential new dealer hoping to attract business by offering more effective and efficient distribution.

More damaging still to potential new dealers will be the powerful incentive the bill will create for existing suppliers to adopt long-run strategies that completely avoid marketing through independent dealers. If the bill passes, suppliers could be driven increasingly to turn to owning their own retail outlets, franchising, relying on mail and catalogue communication, and selling through department stores. None of these marketing techniques is covered by the Dealers Act; all are quite feasible distribution channels and are, indeed, in use today. To the extent that S. 286 artificially expands their use by suppliers, potential new dealers will once again be hurt. In this respect, the bill therefore will be disadvantageous both to new dealers and to new manufacturers. As noted elsewhere, new manufacturers will not be able to go to the expense of integrating vertically into distribution or dealing with a few large dealers.

The Chief Counsel for Advocacy of the Small Business Administration has observed: "Given the procedures provided for in this bill, the current population of dealers is likely to remain static and eventually decline as manufacturers, faced with delays and the possibility of judicial intrusion into their dealer selection process, turn to in-house distributors." This is precisely the problem which leads our Coalition to believe the bill will hurt creation of new dealerships. It is also one of the key reasons a dealer association, the National Office Products Association, opposes the bill. The Federal Trade Commission also sees the bill encouraging suppliers "to do business with a few, large dealers."

New dealers will be discouraged from entering a market where Federal legislation has helped existing dealers lock-in existing suppliers. The bill actively discourages a new dealer from offering more attractive terms to a manufacturer to get his products. New entrants into the dealer market cannot even waive the provisions of this bill to gain a competitive advantage over existing dealers. It makes it much more difficult and problematic for such a manufacturer to shift its products to a new dealer. The ability to break into existing markets will be radically diminished by the expense, hassle, and litigation delays incident to any supplier's decision to change dealer outlets. That is precisely the result the Dealers Act is designed to achieve, and it is, equally clearly, the reason passage of S. 286 will serve no valid public interest.

Question. What about the assertion that S. 286 favors small business? What is your view?

Answer. As has been made clear by Coalition witnesses, by Federal small business and competition policy authorities, and by small business organizations, the Dealers Act, far from favoring small business, poses a particularly severe threat to small business interests.

First, small office equipment manufacturers and other suppliers will, as stated by the Department of Justice, "not be large enough to integrate vertically into distribution" to avoid the costs imposed by the bill of contracting with independent dealers. Hence, the Department notes, these small entities "will be at a competitive disadvantage to their larger, integrated [U.S. and foreign] rivals since only the nonintegrated suppliers would be subject to the requirements of the bill."

Especially disadvantaged by the restrictions in the bill will be potential and new entrants into office equipment markets; they will be at the mercy of dealers to obtain precious shelf-space to introduce their products to the ultimate consumer.

In many cases, new entrants and other small suppliers are actually smaller or more fragile organizations than large dealers in particular markets. Increasingly, regional and national retail chains are playing a visible role in the office equipment market. They hardly need to be artificially protected against other dealers or their suppliers.

Second, the bill will shrink opportunities for small dealers as well as small suppliers. As the Chief Counsel for Advocacy of the Small Business Administration noted, "Given the procedures provided for in this bill, the current population of dealers is likely to remain static and eventually decline as manufacturers, faced with delays and the possibility of judicial intrusion into their dealer selection process, turn to in-house distributors." In general, passage of the bill will induce suppliers to consider all options open to them that appear more efficient and hassle-free than marketing through independent dealers. These will include, in addition to straight in-house sales forces, franchising, mail and catalogue sales, department stores, and reliance upon large dealers capable of handling multiple present and future product lines. None of these methods of distribution is subject to the restrictions in the bill.

As the Department of Justice pointed out, "By raising a supplier's cost of dealing with small dealers, . . . the bill not only will be detrimental to small dealers, but it also may deter suppliers from using numerous small dealers to market different lines of products even when that option is more efficient (from society's standpoint) than the use of a few, large dealers." obviously, the market created by the bill will, especially over time, become more detrimental to small dealers than the free market we have now.

The most important and obvious way in which the bill will harm small dealer interests is that it will lock suppliers into existing relationships with unsatisfactory dealers, thereby imposing "limitations . . . on new or existing dealers seeking to expand," as well as "prevent[ing] new dealers from entering the market," as the Chief Counsel for Advocacy at the Small Business Administration concluded.

Third, as noted in our answer to question 6, S. 286 will in several ways damage the interests of wholesaler—distributors, many of whom smaller businesses than many of their customers. The bill will impose extensive new paperwork burdens on wholesaler-distributors, threaten them with liability for failure to supply products they themselves cannot obtain from their own suppliers, and raise their legal costs.

In sum, S. 286 will impair small business interests by:

Creating new barriers to entry for potential entraints into office equipment manufacturing, wholesaling, and retailing;

Imposing new costs that large suppliers will be able to avoid, but small suppliers will not, thus saddling small suppliers with chronic competitive disadvantages;

Creating incentives for suppliers to market through large dealers, thus taking opportunities from smaller dealers, especially new ones; and

Creating incentives for suppliers to by-pass independent dealers altogether, in favor of distribution through retail stores, franchises, directly owned outlets, or other methods not covered by the bill.

Question. Do you have any comments on the changes to S. 286 proposed by Mr. Nelson of NOMDA in his testimony before the Subcommittee?

Answer. We will offer here what comments we usefully can on the descriptions of the changes NOMDA seeks in the bill as presented by Mr. Nelson of NOMDA in his oral testimony.

1. One of the more outlandish sections of S. 286 in its current form [Section 101(3)] would require suppliers to "furnish the dealer with *any* office product or with any part, on a timely basis." (Emphasis added.) As has been noted by numerous witnesses, this provision would enable any individual dealer to dictate any supplier's marketing strategy, in effect, *for its entire product-line,* even to the point of demanding the delivery of future products. NOMDA now claims to repair Section 101(3) by

amending it to require that suppliers must furnish dealers with "*agreed upon* office products and their parts, reference manuals and schematics, on a timely basis."

The amendment would not remove the unfairness and irrationality of Section 101(3). First, it appears to retain the "timely basis" language in existing Section 101(3), which would force all suppliers promptly to meet the delivery demands of *all* suppliers *all* the time. But this is impossible in practice. As is obvious, shipments of goods may be delayed beyond the time an individual dealer would prefer, for a host of reasons beyond the control of a given supplier. These could include shortages of parts or resources, labor difficulties, transportation bottlenecks, unanticipated demand, etc.

With the "timely basis" requirement in force, suppliers will frequently be caught between the competing demands of their dealers, any one or more of whom may bring an action if dissatisfied with the supplier's delivery priorities concerning its finite supply of goods. Indeed, the supplier would often be able to resolve the dilemmas brought on by such a suit only by interpleading numerous dealers. Such complex litigation would be an enormous expense and headache for all parties, as well as for the Federal courts. Worse still, dealers would almost be driven to initiate suit whenever they feared that supplies might be running short, simply because they know that the supplier's delivery priorities will necessarily have to be responsive to any other dealers anywhere in the country that might otherwise bring suit first. Lawyers would benefit, as would litigious dealers. No one else would, certainly not the public.

Moreover, the term "agreed upon office product" is itself quite troubling. It is both vague and subject to varying judicial interpretations. This ambiguity would create particularly serious problems, given the dynamic character of the office products industry and the evolution of products, where new or modified products, often with the same name, may incorporate the functions of several separate older products.

2. NOMDA's second proposed revision would add an entirely new section that would require a supplier that terminates or declines to renew a dealer agreement to:

"Provide the dealer, at the then current dealer prices, parts, supplies, and technical information for products sold for the longer of any existing customer agreement or five years from the date of the sale of the product."

This proposal is quite astonishing. It would mean that a supplier would have to continue supplying a dealer with parts, regardless of the reason for the decision to cease doing business through the dealer—i.e., even if the dealer has chronically failed to pay for products already delivered, or if the dealer has consistently failed to service the supplier's products effectively, or if the dealer has made inaccurate representations about the supplier's products.

Futhermore, the supplier would have no control over the length of time for which he might be required under the amendment to continue subsidizing and associating his product with an unsatisfactory dealer. This is so because the provision requires the relationship to continue as long as any agreement the dealer has with its customers—over which contracts the supplier has no control. Thus, a dealer would be given the absolutely unprecedented power unilaterally to force suppliers into long-term contractual arrangements, by entering into long-term contracts with their own customers—regardless of their own conduct toward the suppliers.

If added to S. 286, this provision would probably become the most effective "lock-in" weapon in the bill, enabling unsatisfactory dealers not only to raise, but to perpetuate, the costs of transferring business to another sales outlet. The provision will not merely have the effect of assuring undeserving dealers a multi-year supply of parts after their relationships with suppliers ends; the amendment will go a long way toward ensuring that such unsatisfactory relationships never get terminated at all!

To require a supplier to do business with any and all dealers, regardless of how unfit an individual dealer may have shown itself, is not only an unprecedented invasion of the freedom to choose one's business customers, but is wholly without justification. The alleged need for this extraordinary brand of intervention was supported by NOMDA by reference to less than a handful of one-sided, unsubstantiated, anecdotal accounts of individual situations, all drawn from a single and functionally unique market—photocopiers—of the vast multi-market sector covered by S. 286. In each case presented to the Subcommittee, affected suppliers in subsequent communications spelled out crucial inaccuracies and deficiencies in NOMDA's stories. As these suppliers noted, terminated or non-renewed dealers can continue to obtain spare parts from them, and by law, the suppliers must charge a non-discriminatory price. And in any event, the fact is that a dealer in these circumstances will in prac-

tice have the option of purchasing spare parts either from the supplier or from any one of a number of other sources only too happy to sell. Selling to the office products aftermarket is a profitable business. Companies specializing in this function include Katun Corporation, Precision Roller, Inc., Copylite, Inc., Sel-Drum Corporation, Omni-Tek, Inc., Capco, and Photo Receptor, Inc.

3. The third NOMDA amendment proposed at the Subcommittee hearing would purport to impose on "any dealer who enters into a dealer agreement" a duty to act in "good faith" in certain specified circumstances. According to NOMDA's witness, Mr. Nelson, the stated aim of the proposed amendment is to correct the "one-sided" character of the bill in its current state, and to convert it into a measure that is "completely fair and equitable for both dealers and manufacturers." In actuality, the amendment is purely cosmetic, and would not change the inequitable character of the legislation.

Indeed, even on its face the amendment belies NOMDA's claim that it equalizes the burdens imposed by the bill. The amendment would require dealers to exercise "good faith" in three circumstances—(1) in "negotiating" a dealer agreement, (2) in "performing" the agreement, and (3) in "complying with" the agreement. But in contrast, suppliers are enjoined to exercise "good faith" in eight defined circumstances, five more than are prescribed for dealers by this amendment. In addition to the three noted above specified for both dealers and suppliers, suppliers must show "good faith" in (1) "presenting" the terms of an agreement, (2) "describing" it, (3) in "terminating" an agreement, (4) "canceling" it or (5) finally, and probably most significantly, in "refusing to renew the dealer agreement." S. 286, § 101(1), (2), (4).

Moreover, S. 286 imposes numerous additional restrictions adversely affecting suppliers, apart from its "good faith" provisions noted above, both in Title I and in the provisions of Title II ("Procedures for Termination") and Title III ("Miscellaneous Provisions"). No attempt is made in NOMDA's proposal to so much as pretend to "balance" the inequitable effects of these provisions.

When one examines the substantive impact of that carefully limited area of the bill in which NOMDA's amendment purports to balance the mutual obligations of suppliers and dealers, the actual effects would be negligible at most. Requiring dealers to carry out in good faith their obligations to "perform" and "comply with" contractual provisions amounts to making it a federal offense to fail to do what a dealer must under state contract law do in any event. Requiring, in Title I, that dealers should "comply with the procedures set out in Title II" is similarly superfluous—the more so since all that title (which prescribes "procedures for termination") actually requires of dealers is to serve arbitration demands on suppliers and accept the money if they win.

In short, this amendment, extending to dealers in a limited set of circumstances the unique good faith requirement vaguely defined in Section 2(8), in no way equalizes the specific burdens or the overall impact of S. 286.

All of the anti-competitive, anti-small business features of S. 286, all of the unique federal intrusions into this marketplace, all of the special interest features of the bill, remain intact.

Question. What would be the impact of S. 286 on wholesalers?

Answer. The National Association of Wholesaler-Distributors (NAW), a member of the Coalition for Competition, has actively opposed the passage of S. 286 and its predecessors since 1981. NAW has submitted the statement of Raymond K. Benza, on behalf of NAW and the National Association of Writing instrument Distributors, in opposition to S. 286 at the Senate Commerce Committee hearings on September 14, 1983. Mr. Benza is also the President of R.E. Kindel Company, Inc. of Cincinnati, Ohio, a wholesaler-distributor of writing instruments and other office products. In addition, the Wholesale Stationers' Association, another NAW member, has also filed a statement in opposition to S. 286.

According to its proponents, S. 286 is directed toward large foreign manufacturers of office machines who have allegedly utilized unfair practices in doing business with their dealers. (Statement of Senator Exon, Congressional Record, Vol. 129, No. 6., January 31, 1983). However, the scope of S. 286 goes far beyond these foreign manufacturers so as to include domestic manufacturers and wholesaler-distributors under the "supplier" umbrella. NAW believes that the passage of S. 286 in its present form or with the modifications described by NOMDA witnesses at the Subcommittee hearing, will have a serious adverse impact on wholesaler-distributors.

The vast number of wholesaler-distributors are small family owned businesses such as R.E. Kindel Company, Inc. Indeed in many instances, the dealers whom S. 286 is designed to protect may be larger than the wholesaler-distributor who will have to carry the financial burden of compliance imposed by this legislation.

The marketplace serviced by the wholesaler-distributor is a highly competitive one. In fact, in the market area serviced by R.E. Kindel Company, Inc., there are nineteen competitors attempting to sell the dealer the same lines of products. Clearly, the dealer is in an advantageous position to obtain the products he wants at comptitive prices and terms. In addition, the wholesaler-distributor does not normally sell to dealers on the basis of long-term written agreements, but rather on a purchase order basis. Further, many of the transactions between the wholesaler-distributor and its dealer are oral agreements resulting from telephone orders. Yet, all such agreements fall within the definition of "dealer agreement" under Section 2(3) of S. 286.

The wholesaler-distributor is not a manufacturer. However, the catch-all definition of "supplier" contained in S. 286 treats the wholesaler-distributor as a manufacture and all of the duties and obligations contained in this legislation are imposed on the wholesaler-distributor. NAW submits that such treatment ignores the realities of the market place and puts the wholesaler-distributor in the precarious position of having to fulfill statutory obligations without having control over the events which may result in a violation of such obligations. For example, where the manufacturer sells its product through the wholesaler-distributor who ultimately sells to a dealer, if the manufacturer is unable to deliver the product to the wholesaler-distributor who, in turn, is unable to fulfill the terms of the dealer agreement, the wholesaler may stand in violation of the draconian Section 101(3), which requires suppliers to "furnish the dealer with any office product or, part . . . on a timely basis."

It is interesting to note that the record of the hearings in both the House and Senate concerning this legislation is totally devoid of even any allegations of abusive practices by wholesaler-distributors. Hence, the effect of the vast coverage of S. 286 is to penalize wholesaler-distributors for the alleged unfair practices of others. The better solution to the alleged problem is to allow market place forces, backed up by the very powerful remedies already available under existing federal and state law, to weed out the abusive manufacturers. This resolution has already begun, as indicated in Mr. Goldberg's Article in the July, 1983 edition of the NOMDA Spokesman.

S. 286, if enacted, will also result in higher costs of operation for the wholesaler-distributor. These higher costs will be incurred as a result of the compliance costs associated with this legislation. The wholesaler-distributor will be required to determine (a) whether a dealer agreement exists between the wholesaler and the dealer: (b) whether the dealer is primarily engaged in the business of selling an office product to an end-user; and (c) whether the product is covered by the Act including the price threshold test and if the product is designed primarily for use in an office environment. Each of these determinations will require the expenditure of time and money by the wholesaler-distributor and will have to be made for each transaction between the wholesaler-distributor and a dealer. For example, a dealer may sell some products which fall within the scope of S. 286 but not others. Similarly, a product may be designed for use either within the office environment or outside such environment with equal effect. Further, the sale of the same product may be covered by the Act when sold to one dealer and not be covered when sold to another dealer. However, the wholesaler-distributor will be required to determine in each instance whether or not the transaction is covered under S. 286. As a result the wholesaler-distributor's costs will undoubtedly increase. Such increase will ultimately be reflected in the price paid by the consumer.

The impact of S. 286 on the wholesaler-distributor is severe. The imposition of the statutory requirements of S. 286 is unfair, unreasonable, and unwarranted, where there is no legitimate basis for this legislation. Finally, the compliance costs associated with S. 286 will have a serious financial impact on the wholesaler-distributor at a time when capital is needed for the expansion of his business.

Question. NOMDA's legal counsel, Mr. Goldberg, said in his prepared statement (page 7) that "One thing is certain, though and that is that opponents of S. 286 are strongly against a balanced industry, good faith conduct, adequate notice of significant market changes in a dealer's area, arbitration of disputes, free association, and the right to be represented by counsel." Would you care to comment?

Answer. Mr. Goldberg does not specify what he means by his term "a balanced industry." But it appears that he expects S. 286 to tend to freeze the office equipment industry into particular patterns or structures, in which existing dealers tend to have a lock on their suppliers to market all current and future products. If that is what he means, the Coalition is strongly against this and any other proposal intended to have government impose NOMDA's particular concept of "balance" on a

dynamic industry where competition and innovation are effective guarantors of efficiency and fairness.

The Coalition of course shares the general reverence all citizens feel for "good faith conduct," "free association," and "the right to be represented by counsel." We believe that, as the Federal Trade Commission and the Department of Justice have affirmed, these fundamental rights are already effectively guaranteed by existing Federal and state law.

The Coalition believes that questions relating to "notice of significant market changes in a dealer's area" and "arbitration of disputes" should be resolved voluntarily, through negotiation and agreement, by parties to particular transaction. These are not the kinds of requirements that should be dictated by government fiat, as imposed by S. 286.

Question. Has IBM made a firm decision to use independent dealers to market their small computers, or it the company still evaluating that decision? What would be the impact of S. 286 on IBM's plans?

Answer. The Coalition has asked Terry Lautenbach, IBM Vice President—Business Development, Information Systems Group, and a Coalition witness before the Subcommittee at its September 14 hearing, to answer this question directly. Mr. Lautenbach has answered in a letter to Senator Kasten, the text of which is reproduced below:

"We have not made an irrevocable decision to use independent dealers. At the present time, IBM uses independent dealers as an additional distribution channel to market the IBM Personal Computer and selected IBM typewriters throughout the United States. To date, we have selected and contracted with over 1,300 PC dealers and over 200 typewriter dealers. This decision to market these products through independent dealers as based on our evaluation of existing market conditions and the cost efficient distribution channel dealers represented. Furthermore, it was our conclusion that dealers were an effective way to reach customers in addition to those normally serviced by our own marketing organizations. So far, the use of dealers, though brief, has been a positive one and, in our opinion, profitable for both dealers and IBM. Only three dealer agreements have not been renewed and these only for accounts receivable reasons. No dealers have been terminated prior to expiration of their agreement. Thus, I believe strongly that, if market conditions remain the same (including existing distribution costs and the breadth of current law), there is little reason for IBM to retreat from its decision to use independent dealers.

"However, as you are well aware, the information systems industry in the United States is innovative, dynamic and competitive. U.S. manufacturers must continually reevaluate their plans, assumptions and product marketing strategies based upon the existing risk of doing business in a competitive market. We believe the passage of legislation like S. 286 would expose IBM as well as other U.S. manufacturers to a variety of new unknown risks. These risks translate into new additional costs for suppliers, increased prices to consumers, and therefore would dramatically reduce the desirability of independent dealers as a channel of product distribution. The most significant risks in S. 286 come from: 1) a concept of goodwill compensation that ignores the market value of a superior product or the manufacturer's good name; 2) the unjustifiable requirement for a supplier to provide a dealer any product, which precludes all future product marketing decisions, and 3) exposure to frivolous litigation based on a sweeping, ill-defined, special interest law. These are real problems, each tipping the balance of good business judgment against the use of dealers because the potential increased costs destroy the benefits of dealers as an efficient means of product marketing.

"As you may know, the evolution of micro-computer and software technology has caused an explosion of U.S. product innovation, especially in office work stations and personal computers. Hundreds of U.S. manufacturers are competing for limited dealer outlets for their products. This has resulted in the advent and rapid growth of personal computer retailers and software specialty stores, a phenomenon of only the last few years that reflects opportunities for suppliers and dealers alike. To inject the burdens of S. 286 on this healthy, vital segment of U.S. industry is unjustified and ill advised. The costs of S. 286 would not only force IBM to reevaluate its distribution plans, but would also slow the growth of many new small U.S. high technology firms. These small firms, unlike IBM, do not have alternative distribution channels, such as their own sales force and are, therefore, completely dependent upon dealers for distribution of their products. Increasing the cost of doing business with dealers will inevitably hurt these small U.S. manufacturers who are trying to establish a firm footing for growth and export.

"I am enclosing two recent news articles, from Dun's Business Month and The Washington Post, which report on the distribution bottleneck in this industry.

"If you should desire a further explanation or any additional information, please do not hesitate to call me or Stuart Eizenstat."

Question. Have some dealers successfully sued suppliers under state and federal law?

Answer. Dealers have indeed successfully sued manufacturers under both the federal antitrust laws and under state contract and tort law. There is no question but that the panoply of remedies for redress of legitimate dealer grievances is more than adequate—increasingly so, as NOMDA counsel Robert C. Goldberg has acknowledged in urging NOMDA members in their negotiations with suppliers to take advantage of "significant changes in the law . . . ." NOMDA Spokesman, p. 14 (July 1983)

Some of the "significant" new precedents to which NOMDA's counsel may be referring include:

"Eiberger v. *Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), aff'd in part, rev'd in part on other grounds, 622 F.2d 1068 (2d Cir. 1980). Here the Court of Appeals upheld the District Court's ruling that the Federal antitrust laws were violated by defendant supplier's system of "warranty fees," when the so-called fees were in practice used "to prevent price cutting and eliminate competition" among dealers in different territories. 622 F.2d at 1081.

"P & S Business Machines v. *Olympia U.S.A.*, 707 F.2d 1321 (11th Cir. 1983). Here the Court of Appeals reversed the trial court's judgment for defendant supplier notwithstanding a $3,000,000 verdict in favor of plaintiff dealer, where the dealer charged the supplier with common law fraud and deceit for helping three of the dealer's former employees to set up a new dealership to which defendant's business was subsequently transferred. The court stated that there was "considerable evidence introduced by [plaintiff dealer] that, if believed, could support a recovery in multiple areas," and remanded the case for a new trial consistent with Alabama law.

"Graphic Products Distributors, Inc. v. *Itek Corp.*, 1983-2 CCH Trade Cas. ¶ 65,670 (11th Cir. 1983). Here the court held a supplier in violation of the Sherman Act when it terminated a dealer for making sales outside the dealer's assigned service area.

The above recent decisions, as well as numerous similar cases in analogous circumstances affecting commercial relationships outside the office equipment industry, confirm that the courts are willing and able to step in to redress wrongs when genuinely unfair, anticompetitive, or otherwise illegal supplier actions are brought to light.

Indeed, it is noteworthy that one of the principals of P&S Business Machines in the *P&S* case above, testified in the past on behalf of NOMDA before this Subcommittee. Yet he has demonstrated the availability of the courts under existing law by the lawsuit he is pursuing.

Moreover, it should be emphasized, reported decisions do not accurately reflect the number of cases between dealers and suppliers, since some such suits are settled without trial. Often, defendants elect to settle claims that they consider lacking in merit, simply to cut the hassle and cost of litigation. The incentive to settle is particularly great for defendants facing antitrust claims, in view of the intimidating threat posed by the specter of possible treble damage liability.

It might be noted that suppliers as well as dealers have found occasion to invoke the aid of the law. For example, on April 29, 1983, a California Federal District Court rejected a defendant dealer's attempt to abort, on summary judgment motion, an antitrust lawsuit by a manufacturer of dictating equipment. The manufacturer claimed that the dealers in concert with other co-conspirators, including NOMDA, "engaged in a horizontal conspiracy to divide the market for dictation products to fix prices, boycott and refuse to deal in violation of § 1 of the Sherman Act." In rejecting the dealer's motion to deny these claims without trial, the court held that the evidence made it "reasonable to infer that at meetings involving distributors of the plaintiff supplier's products, "a NOMDA attorney," and the "Chair of the Manufacturer—Dealer Relations Committee of NOMDA," the NOMDA Committee Chair "agreed to pressure [plaintiff supplier] to reinstitute exclusive distributorships." *U.S. Audio & Copy Corp.* v. *Philips Business Systems, Inc.*, 1983-1 CCH Trade Cases ¶ 65,364, at p. 70,172 (N.D. Cal. 1983).

Question. Please compare S. 286 with the Auto Dealers Day in Court Act.

Answer. Supporters of S. 286 have characterized it as analogous to the Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221 *et seq.* (the "Auto Dealer Act"). They would have us believe that the proposed bill merely extends to office products dealers the same kind of protection which is already afforded to car dealers. In fact, however, S. 286 and the Auto Dealer Act are very different in scope, and in the sub-

stantive rights and remedies each creates. NOMDA's comparison of these bills is nothing more than a transparent attempt to give a bad bill a free ride on the coattails of an existing one.

I. UNLIKE THE OLIGOPOLISTIC 1957 AUTO MARKET, THE 1983 OFFICE EQUIPMENT MARKET IS VIGOROUSLY COMPETITIVE AND DOES NOT JUSTIFY SPECIAL FEDERAL INTERVENTION

Broadly speaking, S. 286 and the Auto Dealers Act each create a federal cause of action in favor of dealers, arising out of their contractual relations with suppliers. That is where the similarity ends.

The first and most critical difference between S. 286 and the Auto Dealers Act concerns not their respective provisions but the markets they cover. In the case of the Auto Dealers Act, Congress was persuaded to intervene on their behalf in view of what was at the time (1957) a market pervasively dominated by only three large manufacturing companies. Each dealer was totally dependent on one of the big three. He sold (and serviced) only the products of that single supplier. In contrast, as witnesses have repeatedly observed, dealers in office equipment may choose from among multiple suppliers in all the many lines of products they decide to handle. Dealers typically handle more than one supplier in each of their product lines. The 1957 auto dealers market gave them little or no choice; the 1983 office equipment dealers market gives them more choice than just about any market in which independent retailers play a major role. NOMDA has shown no need for extraordinary Federal protection.

II. S. 286 IMPOSES FAR MORE ONEROUS RESTRICTIONS AND BURDENS ON SUPPLIERS THAN DOES THE AUTO DEALERS ACT

But apart from the vast difference between the markets affected by the two measures, S. 286 would go far beyond the Auto Dealers Act to create new rights and remedies never before accorded to dealers in general, including automobile dealers, under federal law.

The substantive terms of the Office Machine Dealers bill differ sharply from those of the Auto Dealers Day in Court Act. Some of the most far-reaching differences between the two measures include:

The Auto Dealers Act has no requirement remotely comparable to the provision in S. 286 [§ 101(3)] that suppliers must promptly deliver any product demanded by a dealer. Indeed, in contrast to the express language of S. 286, the Auto Dealers Act has been held not to authorize a suit for late delivery of a model by the manufacturer. *General Motors* v. *Mac Co.*, 247 F. Supp. 723 (D. Colo. 1965). Moreover, the Auto Dealers Act is limited by its terms to three products—cars, trucks, and station wagons—so that no auto dealer could require delivery of snowmobiles, marine engines, mobile homes, household appliances, military tanks or other products produced by auto manufacturers. By contrast, S. 286 requires a delivery on a dealer's demand of all products made by any supplier.

The Auto Dealers Act has no requirement comparable to the provision in S. 286 [§ 101(4)] that termination of a contract before its express term expires (or if it has no such express expiration date) can only occur with 60 days notice, and then only by compensation including an amount for lost "good will." As discussed by numerous witnesses, this unprecedented requirement will erect formidable obstacles to transfer of business from an unsatisfactory dealer, regardless of the provocation—for example, regardless of whether the dealer has been chronically unable to meet its financial obligations to the supplier or its service obligations to customers.

While both measures contain definitions of "good faith," S. 286 creates a new definition that is broader and potentially much more radical than its counterpart in the Auto Dealers Act. S. 286 narrows the range of permissible "good faith" supplier conduct to "reasonable" recommendation persuasion, and argument [§ 2(8)], whatever "reasonable" may be held by the courts to mean.

As noted above, the subject matter of the Auto Dealers Act is narrowly defined—passenger cars, station wagons and trucks. S. 286, on the other hand, covers a broad, ill-defined range of office products. In addition, the classes of persons protected by each differ markedly. The Auto Dealers Act grants rights to a "dealer", defined as any person "operating under the terms of a 'franchise'." 15 U.S.C. § 1221(c). Under the provisions of the Auto Dealers Act the word "franchise" does not have its usual meaning. Instead, it is defined as any written agreement between a manufacturer and a dealer. 15 U.S.C. § 1221(b). S. 286 takes a very different approach. The requirements of this bill would apply to written and oral agreements between dealers and their suppliers, § 2(3), and its definition of "dealer" specifically excludes what is commonly known as a franchisee. § 2(2).

S. 286 would suspend the Statute of Frauds, in force in forty-nine states and the District of Columbia as § 2-201 of the Uniform Commercial Code, by permitting the perpetual enforcement of oral agreements covering the distribution of office products. The Statute of Frauds is older than the Republic and is deeply rooted in Anglo-American public policy. The Auto Dealers Act was purposely drafted to exclude claims based on oral agreements. *Southern Rambler Sales, Inc.* v. *American Motors Corp.*, 375 F.2d 932 (5th Cir.), *cert. denied*, 398 U.S. 832 (1967). S. 286 is an ill-conceived attempt to change this long-standing policy to suit the whim of a single interest group.

In addition to the above differences between the two measures, the Auto Dealers Act lacks many other burdensome and irrational requirements found in S. 286. For example, the Auto Dealers Act has no contractual arbitration provision, no anti-waiver provisions, and no provision for the award of attorneys fee in the litigation to proliferate under the vague terms of S. 286. Yet, S. 286 contains each of these provisions.

In short, the office equipment sector in 1983 is a completely different and far more competitive market than the automobile sector in 1957, and the bill proposed by NOMDA to give existing office dealers power over that market is far more radical, irrational, and onerous, than the 1957 Auto Dealers Act.

QUESTIONS OF SENATOR RIEGLE AND THE ANSWERS OF MR. LAUTENBACH

Question 1. We have heard testimony about dealers terminated or non-renewed and finding thenselves, so they say, without access to replacement parts for products they had already sold at what they consider reasonable prices. Does that sound like a common problem? What is your company's policy regarding such situations? What remedies would a dealer have?

Question 2. We heard testimony about dealers being forced to perform warranty work on office products without adequate compensation. How do such allegations fit with our company's experience and with its own policies and practices?

INTERNATIONAL BUSINESS MACHINE CORP.,
Rye Brook, N.Y., December 14, 1983.

Hon. DONALD W. RIEGLE,
U.S. Senate,
Washington, D.C.

DEAR SENATOR RIEGLE: Thank you for your interest and courtesy during the most recent Senate Subcommittee hearings on S. 286, the Office Machine and Equipment Dealers Act. Through Stuart Eizenstat and the Coalition for Competition, you have asked me two sets of questions; on parts availability and on warranty compensation. My answers are enclosed with this letter. A brief summary of IBM's practices in these areas is outlined below.

We currently market two types of products through independent dealers in the U.S.; personal computers and selected typewriters. Presently, for these two types of products we are developing separate dealer networks, each tailored to the marketing and service requirements of the product. Our parts and warranty practices vary slightly depending on the product characteristics and dealer network.

Briefly, these practices are:

1. *Parts*—terminated or non-renewed dealers (either personal computers or typewriter dealers), as well as third-party servicers who have never been or may not want to be dealers, can buy parts at the same price as currently authorized IBM dealers. This practice does not penalize former dealers and there is not time limit on their ability to buy parts. A more complete answer to your questions on parts issues is attached.

2. *Warranty Compensation.*—

A. *IBM Personal Computer Dealers* are reimbursed for warranty work, after the fact, depending on the type of work performed. Compensation is based on a published rate schedule with rates varying with the type and complexity of service performed.

B. *Typewriter Dealers* are compensated for warranty work at the time they purchase a machine. The price a dealer pays for a typewriter is reduced by an amount equal to the estimated warranty cost a dealer should expend. This estimated warranty cost is a statistical derivation based on over 20 years of IBM warranty cost experience in performing warranty work on our typewriter products. Therefore, a dealer is compensated for warranty work whether he actually performs it or not. On

average, the dealer recovers his warranty compensation through part of the gross margin he gets in selling a typewriter.

Dealer acceptance of our personal computer warranty compensation plan has been very positive. We have, however, received several requests from our typewriter dealers to consider modifications to our typewriter warranty compensation plan. As with any new practice, we are interested in learning how well it works. As we gain experience we will learn what modifications, if any, are justified and make any necessary changes.

IBM is a relative newcomer to the use of independent dealers for marketing selected products. In our experience this is a competitive marketplace in which, we believe, dealers and suppliers must work together. IBM's experience with independent dealers, though brief, has been a very positive one and, in my opinion, has benefited both parties and the consumer. If you should require any further explanation or any additional information, please do not hesitate to call me or Stuart Eizenstat.

Sincerely,

T. R. LAUTENBACH.

Attachment.

ANSWERS TO QUESTIONS FROM SENATOR RIEGLE FOR MR. TERRY LAUTENBACH, IBM

Question. We have heard testimony about dealers terminated or non-renewed and finding themselves, so they say, without access to replacement parts for products they had already sold at what they consider reasonable prices. Does that sound like a common problem? What is your company's policy regarding such situations? What remedies would a dealer have? Is this a common problem?

Answer. I don't believe it is. While our experience in this area is limited, I have seen no evidence that this is a common problem. The example cited in the 1983 hearings by Mr. Nelson of Ohio Business Machine was, I believe, refuted by his supplier, Xerox.

In a competitive market such as this, two significant facts mitigate against capricious action by suppliers: competition among suppliers for limited dealer shelf space; and product reputation, a strong factor in buying decisions when end users have many competing products from which to choose. Manufacturers are strongly motivated to produce products that will compete successfully in the marketplace. Success depends in part on attracting and retaining qualified dealers, and in part on the product's reputation for service. If for some reason a manufacturer or a dealer finds it necessary to end a dealer relationship, the manufacturer still has to be concerned that his product's reputation is not tarnished due to degraded service resulting from parts unavailability. Therefore, it does not behoove a manufacturer to treat a terminated dealer unfairly with respect to parts availability and price.

IBM policy regarding the price and availability of parts, outlined below, treats former dealers the same currently authorized dealers, as long as they pay their bills.

Question. What is IBM's parts policy?

Answer. IBM Personal Computers (PCs): Anyone who is in the business of servicing personal computers (PCs) can purchase our PC parts at dealer prices. This includes authorized IBM dealers, formerly authorized dealers who have been terminated, not renewed or just plain quit, or anyone else who decides to go into the PC servicing business. On the other hand, if you or I wanted to buy PC parts from IBM, we would pay a retail price since we're not in the business of servicing PCs.

IBM Typewriters: For the selected IBM typewriters which we sell through authorized IBM dealers, parts are available at a single price to everyone (dealer, former dealer or end user). A terminated dealer, for example, would pay the same price as an authorized dealer and so would you and I.

For either personal computers or typewriters, former dealers pay the same for parts as authorized dealers.

Question. What remedies would a dealer have?

Answer. Given our parts policy, remedies seem unnecessary.

QUESTIONS OF SENATOR RIEGLE AND THE ANSWERS OF MR. PRATT

Question. Does your company have a program for providing support for your dealers? How does it work? Is it typical? Do you have any sort of system for dealer input into your policies toward dealers—for example, with respect to the establishment or revision of important contract terms?

Answer. Herman Miller is committed to dealer distribution. This commitment requires that we have strong support programs that mutually benefit the success of

the dealership and the company. It makes absolute good business sense to support our dealer community in a variety of ways.

Herman Miller offers many educational and developmental programs to its distribution network. The intent of Herman Miller's dealer support program is to give the dealer (both new and established dealers) an opportunity to improve their sales, profit, and management skills which will help to develop a competitive advantage in the marketplace.

Herman Miller's dealer support program consists of the following:

Dealer orientation sessions; installation/design training; dealer sales training; business management seninars; and product training.

I have attached a copy of our dealer policy which describes the dealer education programs in more detail (please see attachment No. 1).[1]

In addition to training, Herman Miller supports its dealer community by providing Herman Miller sales personnel who work directly with the dealership in the promotion of our product. In addition, Herman Miller has showrooms in every major city in the nation in which the dealers have full access to.

I have attached a copy of the Herman Miller dealer policy which makes up a complete section of our sales manual which is distributed to all sales and sales management personnel. This policy clearly states our commitment to our dealers (see attachment No. 2).

In addition to sales personnel and facilities in the field, Herman Miller also supports its dealership through a Professional Services support program. Herman Miller maintains a Professional Services Group of approximately 45 people (distributed nationally) to support the dealer sales efforts by providing resource assistance in four key areas.

First, the group provides consulting services. Facility consultants aid in evaluating the work process to determine the best application of product to enhance task activity and improve material movement within facilities. Design Resource Services provides design consulting to assist in data collection to promote and support the appropriate application and layout of Herman Miller systems products. Installation consulting and management are also available to assist dealers in providing high quality facility results.

Secondly, the group conducts training sessions to transfer the collective expertise of the Professional Services Group to dealers and the design community with the objective of enhancing their ability to service Herman Miller customers.

Thirdly, the group provides in-depth technical space planning services to meet special end user needs when the dealer or architect does not have the resources or expertise to adequately service the end user's needs.

And, finally, the group oversees the Herman Miller agency program helping to select and work closely with agents to develop installations, design, facility management, and other service functions (see attachment No. 3 which is an article that appeared in the dealer new outlining Professional Services Support program).

In addition to these direct support programs, the company had developed a number of dealer communication programs to strengthen the relationship with our dealer community. The dealer communication programs include: The Dealer Advisory Council, which is a group of 20 dealer principals representing every part of the country and every size of dealership. This council meets with Herman Miller executives twice a year; an executive committee and special subcommittees dealing with finance, and marketing/products meet more frequently. Herman Miller's Dealer Advisory Council is intended to be a communication forum for the dealer community and Herman Miller. Typical discussions include: proposed policies, procedures, and product market programs as well as industry trends.

The Dealer Advisory Council's mandate states: "The underlying objective of the Herman Miller Dealer Advisory Council is to create a mutually beneficial relationship between Herman Miller and its dealer community. To achieve this, a cross-section of the Herman Miller dealer community was selected for the council's membership.

The council is to provide a mutually supportive communications link between Herman Miller and its dealer community. More specifically, the objectives for the council are:

Monitor industry—dealer trends and problems; provide a 'sounding board' for reviewing potential Herman Miller dealer related policies; advise on mutually effective procedures for implementing dealer related policies; identify new produce opportunities; outline needs for dealer training and mechanics of implementation; and bring up and discuss problems or concerns between dealers and the company.

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[1] Attachments have been retained in committee files.

The following lists the major issues brought up by the Dealer Advisory Council since its inception and the action taken by the company.

June 1972, Council requested literature and catalogs be evaluated, expanded, and updated.	Complete sales tool program, initiation of Sales Aid Center, development of dealer advertising and literature guide.
June 1972, compact product/price reference cards.	Implemented Fall 1972
June 1972, price list statement that covers product only and does not include additional services.	Do.
Dealer informed of shipment schedules.....	Implemented fall 1972.
June 1972, request dealer training sessions.	Implemented February 1973.
January 1973, Council initiated dealer service cost analysis.	Survey conducted and completed June 1974.
June 1973, Council requested development of sample service contract.	Completed June 1974.
June 1973, Council requested sample leasing program proposals.	Discussed and produced June 1974.
Requested notification of dealers for split shipments.	Implemented January 1973.
Requested improvement of freight-handling procedures.	Implemented 1973.
Request dealer participation in National Account Program.	Implemented, input continuing on ongoing basis.
Develop better labesl for cartons	Implemented.
Inclusion of purchase orders on F.O.....	Implemented January 1973.
Development of committees to deal with dealer community conerns.	Committee developed: (a) dealer sales compensation; (b) recruiting and training dealer sales personnel; (c) advertising; (d) leasing; (e) product; (f) changing trends in distribution.
June 1975, study "noncompetition" employee contracts.	Reported January 1976.
January 1975, designer compensation study.	Study completed January 1975.
January 1975, case study of showroom modernization.	Study completed.
GSA Program with dealer involvement.....	Implemented June 1976.
January 1975, revised dealer discount structure.	Implemented June 1975.
Guidelines for dealer financial planning....	Discussed June 1975.
June 1975, intermarket program	Implemented January 1977.
Employee Stock Ownership Plan	Discussed January 1976.
January 1976, request national dealer meeting.	Implemented May 1979.
Conflict of business HSG/OFG	Program established for monitoring February, 1976.
Product obsolescence due to product innovation.	New fabric program introduction provided community a special promotion to replace obsolete fabric.
Requested manufacturer-supported management training program.	Fourth Dimension Management, February 1976.
Dealer identification program	In process.
Dealer brochure "Your Herman Miller Dealer".	Distribution June 1977.
June 1976, requested study of the needs of the dealer of the 1980's.	January 1977, meeting discussed continuing council study.
Distribution policy statement	Implemented February 1979.
System for Competitive Pricing Strategy...	Do.
New credit, invoicing, terms policy	In process.
PRODUCT SUGGESTIONS	
a. Current electrical system used in Action Office.® should be improved.	Implemented.
b. Dark tone hardware to be expanded.....	Do.

c. Flipper door mechanism should be improved.	Implemented.
d. Panel-hung drafting table should be added to line.	Do.
e. Work table should be made adjustable so typing table can be raised to serve as a desk surface.	Not implemented.
f. Tele-power poles should be developed	Do.
g. Clothes closet for Action Office system should be added.	Do.
h. Complex assembly tasks, such as double hinge asssembly, should be performed at factory to reduce field assembly labor.	Implemented.
i. Display case, O.C.S. display case should be added.	Not implemented.
j. Magnetic display board in place of tackboard should be added.	Do.
k. Oak laminate should be used rather than neutral tone or oak veneer to achieve the wood appearance at a lower cost.	Implemented.
l. A broader more comprehensive seating solution of the traditional upholstered sofa chair type should be added.	Do.
m. Price list should be expanded to include applicable freight classification to aid the shipping department in minimizing freight cost.	Not implemented.
n. Catalogs of Action Office service parts and repair tools with source and price list.	Implemented.
o. Catalog of Action Office installation and repair tools and service parts, including source and price list, should be prepared for the dealer community.	Do.

In addition to the programs outlined above, Herman Miller produces a dealer news publication quarterly which is distributed to all Herman Miller dealers. This publication reports on activity within the company as well as activity within the dealer community (please see attachment No. 4).

I've also included the November issue of Perspective, which is an employee publication in which we reported on our distribution program (attachment No. 5).

Question 2. Over the years, would you say you have a high degree of turnover in your dealers or have you tended to stick with most of your dealers? When you have been obliged to discontinue a relationship, what have been the causes, or does your company have prescribed criteria for making such decisions? Have such discontinuations come early in relationships with individual dealers or later? How many product-lines do you manufacture in the office products industry? How many dealers do you have? How many times have you been obliged to terminate a dealer?

Answer. There are currently 178 companies which have one or more dealership locations which are authorized to sell the Herman Miller line. Of these 178 companies, 120 have been dealers since the fall of 1978, and most for much longer than that.

It's important to note that more than 200 companies in our industry have been identified as manufacturers competing in our industry. Approximately 80 percent of these competitors have entered the industry since 1967. All of these manufacturers are competing for the services of dealers in our marketplace. Competition for shelf space in good dealerships is fierce; therefore, it is essential to have strong support programs and ethical dealings with dealers so they will elect to represent our company.

It is also important to note that some dealerships are larger than new manufacturers in our industry. An example being Mueller Furniture, whose president testified for Congressman Florio in the House hearing. Because this is a fast-growing and rapidly changing industry which is closely related to the high technology and electronic industries, we see a trend of dealerships merging and growing in size.

Therefore, it makes absolute good business sense to have strong dealer relationships and only not renew those relationships which are no longer mutually beneficial.

I've attached a copy of Herman Miller's current policy for adding or not renewing dealers. This policy, with only minor modifications, has been in effect over the past three years. It has been distributed to all sales and sales management personnel and is strictly in force. Please note the highlighted sections which proves that dealers are given every opportunity to retain our line before they are nonrenewed.

I've also included the application form which we distribute to perspective dealers to ensure that any dealer we bring on has the necessary qualifications to become a Herman Miller dealer (see attachment No. 6).

I've also attached a copy of Herman Miller's current agreement with its dealers. It clearly states the obligations of both Herman Miller and the dealers.

Herman Miller has never terminated a dealer during the stated term of agreement. Nonrenewal always occurs at the expiration of the agreement with the appropriate notification given as stated. The only reason for nonrenewal is when the dealer fails to meet the obligations contained in the agreement (see attachment No. 7).

I've also provided you a list of Herman Miller product lines. I want to again emphasize that many of these products cannot be defined easily as office furniture and some involve electronic components which, in our opinion and the opinion of our attorneys, qualifies us under the Office Equipment and Machine Dealers Act.

Senator KASTEN. Thank you, Senator Exon.

I would like to thank all the members of this panel, as well as the previous panel and also the Honorable George Douglas. We appreciate your efforts this morning.

Senator Gorton, who is a member of the committee, was unable to be here today, but I am informed that Senator Gorton will be submitting questions for the record. There may be other members of the committee that would desire to submit questions for the record. Those questions will be submitted to the members of the panel. We are hopeful that you could get back to us with those answers within roughly 2 weeks.

Once more, we thank all of you very much, and thank you, Senator Exon.

The hearing is adjourned.

[Whereupon, at 12:30 p.m., the subcommittee recessed, subject to the call of the Chair.]

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ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF A. G. W. BIDDLE, PRESIDENT, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Good morning, Mr. Chairman and Members of the Committee. I am A. G. W. Biddle, President of the Computer & Communications Industry Association (CCIA). The CCIA represents some 70 leading manufacturers and providers of computers, magnetic storage systems, printers, terminals, data and voice communications equipment and information processing services as well as data processing services. Our member firms range in size from under one million dollars in annual revenues to well over a billion dollars. Together they generate annual revenues in excess of $6.5 billion and generate over 200 thousand jobs.

During the eleven years that our Association has represented the interests of the computer and communications industries in Washington, we have always supported legislation that would improve and modernize our antitrust laws and their enforcement, and sought improvement in the competitive conditions faced by the smaller companies in our industry—one of the few business groups to do so. We firmly believe in fair dealing, free and open competition among equals and the elimination of restrictions on market entry by any firm possessing the requisite skills and resources.

We are gravely concerned about the anticompetitive impact that passage of the Office Machine and Equipment Dealers' Act would have not on small and medium-sized suppliers, but on consumers and dealers as well. We trust that the members of this Committee, being dedicated to the preservation of the free enterprise system, will not take initiatives which would have such an adverse affect.

Our analysis of S. 286 leads us to conclude that its passage would lead to further erosion of America's world leadership position in high-technology products. It would deny U.S. consumers the freedom of choice in product selection they now enjoy and force them to pay higher prices for those products which they could purchase. Furthermore, passage of this bill would bring about the demise of the very office equipment dealers it is drafted to protect. Certainly, if this bill were enacted the result would be a tremendous amount of litigation which would further burden our already overloaded courts. Let me expand briefly on each of these statements.

The explosive growth in our industry in the past three decades has almost without exception been fueled by small, entrepreneurial companies, which have found markets only through the identification of a valid need and the satisfaction of that need through the application of our rapidly expanding capabilities in electronics. Literally hundreds of companies have come into existence in the past 15 years whose primary thrust was to contribute to desperately needed productivity improvement in the office environment. Companies like CPT, Wang, Lanier, Lexitron, NBI in the word processing field; Basic Four, MDS, Qantel, Harris, Perkin-Elmer, Hewlett Packard, and Datapoint in minicomputers; and the even more recent phenomenon of the entry of Apple, Commodore, Tandy, Atari, and others into the microcomputer field.

In many instances, these firms recognized the impossible market entry barrier represented by the cost of creating their own nationwide sales and service organizations. Many turned to established office equipment dealers; other helped local entrepreneurs start new businesses to sell and service their products.

As a result of this synergistic relationship, many locally owned and operated dealerships and franchise operations have become extremely profitable—but, even more important, the rapid growth spawned by these relationships allowed the manufacturers to achieve economies of scale in production and to invest more money in advanced product research and development. In many product sectors this has resulted in U.S. manufacturers achieving a position of world leadership. The last time we collected export data, for example, our member firms were exporting almost 40% of their production. I believe that I can safely say that had S. 286 been enacted into law 10 years ago, much of this would not have come about. Thousands of jobs for U.S. citizens would not have been created, and our balance of trade problems would

be even worse than they are today. It has been the teamwork between quality dealers and quality manufacturers that has been the source of these benefits and allowed both to grow and prosper.

We believe that enactment of S. 286 would destroy that teamwork to the detriment of all. It is our judgment that the Office Machine and Equipment Dealers' Act is unnecessary and imprudent legislation. There has been no substantial showing that the public interest would be served by legislation of this kind. In fact, its passage could well serve to stifle the flow of capital to new manufacturing firms, and thus stemming the flow of innovative new products to the dealers who support it.

One of our member firms is a well respected venture capitol company, one of many such firms which provide the seed money needed to start new enterprises in our country. Mr. Robert Brueck, General Partner of Business Development Partners, wrote to me last week to express his concerns about S. 286. His letter follows:

BUSINESS DEVELOPMENT PARTNERS OF THE SOUTHWEST,
September 9, 1983.

A. G. W. BIDDLE,
President, CCIA,
Arlington, Va.

DEAR JACK: I understand that the Dealer Protection Act which Senator Exon first introduced in May 1981 is still in the mill, somewhat revised as S. 286, the proposed "Office Machinery and Equipment Dealers' Act." If you can, please incorporate the following facts and opinions in some form of testimony on the merit, or lack thereof, of the proposed legislation.

I write as a venture capital investor and one who has over twenty years of very relevant business experience. As you already know, as a general citizen, I believe the legislation is an insidious threat to our system and heritage of law, as well as unneeded and potentially very counterproductive. I believe its most likely outcome would be: to increase prices, to disrupt the flow of goods and services, to cause a proliferation of otherwise unnecessary litigation, to destroy or at least significantly reduce major investment of both dealers and manufacturers, and to delay or eliminate much of the anti-inflationary benefit to our economy now being provided through microelectronics technology.

As a venture capital investor, I wish to share facts, as well as opinion. As we all know, small venture capital backed-companies are the main source of innovation and major new product development within our society. They also create jobs—by the millions, and with the greatest efficiency (capital cost or risk per permanent job created) of any sector of business or government. The Senate has made note of these and other related facts in recent years, and has passed legislation to remove barriers and create incentives for small, especially technology-based, companies.

We also know that new small companies do not spring forth with large established product distribution organizations to sell and service their products—especially products to be sold to individual or small business buyers, rather than buyers representing large organizations. These very small companies who contribute to our overall economy and standard of living far out of proportion to their revenues and income taxes paid in their formative years, are absolutely dependent upon dealers to sell and support their products. Of course, there are exceptions but in the main, this is a fact.

From the dealers' perspective, it is imperative that thousands of dealers annually acquire new and rapidly selling microelectronic products if they wish to stay in business. Often this requires that they free-up shelf space taken by slow-moving products of one supplier in their costly inventory, and replace that product with one from a new and different source of supply that will generate profit.

During times of high interest rates, this changing mix of products/suppliers takes place frequently, and is clearly stressful to both manufacturers and dealers—but that is what both must be able to cope with in a business-like manner if they deserve to stay in business. Strong, positive relationships develop and grow over the years when business is good for both parties.

When the dynamics within our society, and/or the shortcomings in business management on either side, create a situation where the relationship cannot be profitable for both sides, it will probably terminate. In this event, neither party is likely to be treated unfairly for any reason that would, or could be, eliminated by the proposed legislation. There will be situations where poorly done business agreements, inadequate resources to fulfill obligations, or just dishonest or incompetent people will result in one or both parties feeling very abused—but again, where is the evidence that this proposed legislation will preclude those situations? Existing business

practices and contract law are quite adequate for describing these types of business relationships.

The point of my above remarks is that both parties must generally work hard to establish the good and enduring interdependent relationships, and to avoid relationships that would lead to dissatisfaction. I, and many others in the venture capital investing business, believe that the proposed legislation would create many more problems than it would help cure. If changes are made that relieve dealers of a significant portion of their responsibility in establishing and maintaining good relationships, the channels of distribution for product from new and innovative companies will be severely impacted.

It is my opinion that the proposed legislation, however well intended, would *not* benefit dealers in the long run, and *would* introduce major uncertainties in the future of much product distribution in this country. Unfortunately for many of the small but vitally important companies we like to invest in, that uncertainty would in many cases eliminate their chances of being financed. Although I believe the proposed legislation would be highly disruptive when put to practice, the fact of its passage would alone be a negative factor in investment decisions, long before the actual effects take place.

I sincerely hope that you can record my objections, both as an investor and those of a broader nature.

Best Regards,

ROBERT L. BRUECK, *General Partner.*

In addition to Mr. Brueck, many of CCIA's member companies have expressed alarm over the uncertainties and interference with established manufacturer-dealer business relationships which this bill would create. These relationships, governed by contract, have sufficient stature to be constitutionally protected.

Article I, Section 10, of the United States Constitution states that no State shall pass any law impairing the obligation of contracts. While this would be an Act of the United States, the legislation counters the spirt of the Constitution which protects the sanctity of contracts. There is no evidence that the contract process upon which United States commercial enterprise is based needs to be replaced by the pervasive government and judicial regulation which this legislation would impose.

Furthermore, enactment of S. 286 would upset statutes in the 49 of the 50 states which have adopted the Uniform Commercial Code—a viable set of ground rules governing the very relationships which this bill seeks to modify. Does this Committee wish effectively to repeal 49 state statutes to provide an "out" for a dealer who is simply unwilling to tell a manufacturer that "I do not wish to carry your product line unless—?"

I am not suggesting that there are no unprincipled manufacturers in this world, nor do I believe that the drafters of this legislation mean to suggest that there are no unprincipled or incompetent dealers. However, I do ask the Members of this Committee to examine realistically the issues before you.

A good manufacturer knows that in the American free enterprise system you grow—or you die. This is the ultimate truth in technology-based industries. A good dealer knows that his reputation for integrity and service is the key to success. It is in the self interest of both manufacurer and dealer to produce, deliver and maintain a product that generates satisfaction and profit for the manufacturer, the dealer, and the ultimate consumer.

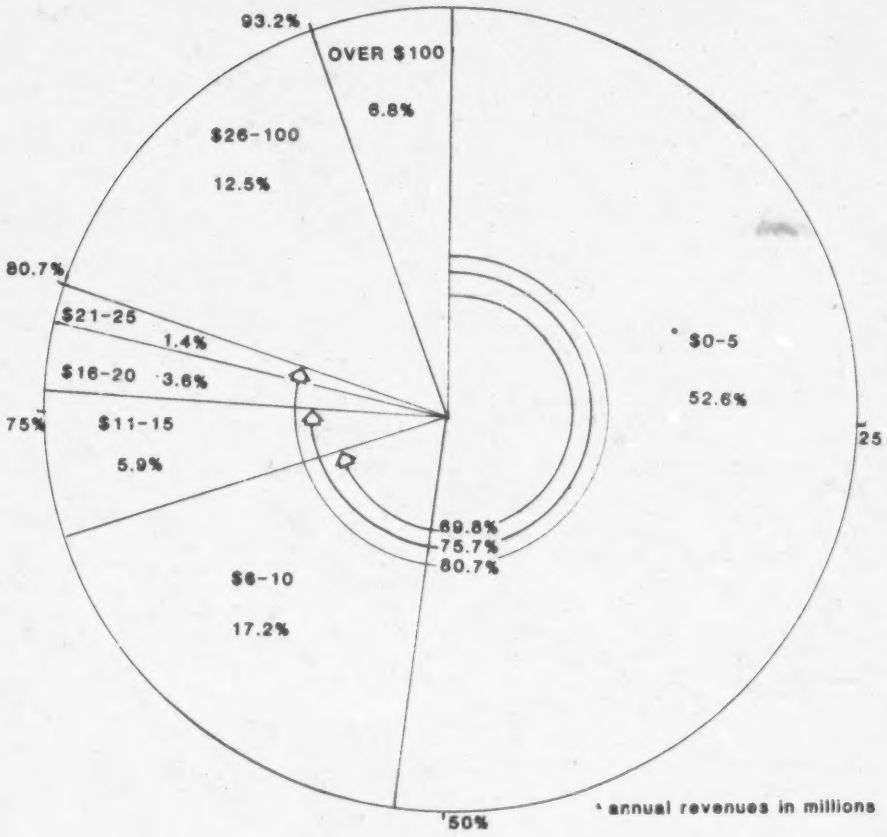
The manufacturer who produces a shoddy product, or who doesn't stand behind it, will not get or keep quality dealers. His competitor who does, will. The quality dealer knows that his supplier must gain market share if he is to remain competitive in terms of product and price. That dealer also knows that if he builds an organization that achieves his and his supplier's mutual objectives, the manufacturer has little to gain by appointing additional dealers or by opening company-owned outlets. On the other hand, if a dealer fails, or refuses, to build an organization that can exploit the full market potential of the product, why should the manufacturer's opportunities be foreclosed?

My point is simply this: both parties are free to enter into a business arrangement from which both can expect to profit; neither party has a gun to his head. If dealer "X" doesn't like the relationship proposed by manufacturer "A," he can and should seek relationships with manufacturers "B," "C," or "D." If other dealers feel the same way about manufacturer "A," he will soon be out of business. If other dealers feel differently, and prosper in their relationship with manufacturer "A," we should question the business acumen of dealer "X." That's the free enterprise system at work, and gentlemen, "If it ain't broke, don't fix it." With all due respect for an impressive special interest lobbying effort, I suggest that "it ain't broke."

I have seen no evidence presented to the Congressional Committees that have held hearings on this bill which would indicate that there is anything that limits a dealer's ability to say "I don't like the way you do business, and, therefore, I will not carry your product."

At this point it may be appropriate to note that in the course of the many hearings on this subject dealers have made frequent reference to the quote marks "enormous" disparity in size between dealers and their suppliers. In an attempt to provide the Members of this Committee with some quantification of this enormous disparity, we analyzed the 127 companies who comprise the List of Advertisers on page 271 of the May, 1983 issue of Computer Merchandising, a publication directed towards an audience of computer and office equipment dealers. A chart depicting the relative size of these suppliers seeking dealer relationships appears below. Included within those firms shown as "under $5 million" are numerous new entrants who are still privately held and too small to be listed in any standard industry reference source. It is interesting to note overall that 52.6 percent of the listed suppliers are smaller than $5 million in annual revenues, 69.8 percent are smaller than $10 million in annual revenues, and 80.7 percent are under $25 million annually.

RELATIVE SIZE of MANUFACTURERS SEEKING RETAIL DISTRIBUTION THROUGH COMPUTER DEALERS



Source: advertisers, Computer Merchandising, May 1983
Standard & Poor's, Data Sources, industry reference materials

Earlier in my remarks, I mentioned the cooperative relationships between manufacturers and dealers which have allowed both to prosper. Secton 101(6) of this bill not only prohibits a supplier from denying a dealer the right to be accompanied by counsel, it virtually mandates that any time a supplier's representative calls on a dealer—even if it is to discuss a new product or promotion—he too must be accompanied by counsel. Suddenly, what was to have been a mutually profitable relationship based on trust has been turned by an act of Congress into an adversarial one.

The bill as now drafted contains numerous terms of art that are so ambiguous as to demand judicial construction. This will inevitably generate enormous legal fees to pay for the innumerable hours of such litigation while further overloading our courts.

The bill is based on a "good faith" standard which is seriously flawed. The Act depends heavily on this term and, in so doing, fails as an absurd attempt to legislate the conundrums of human behavior and relationships. In addition, the Act would be constitutionally void for vagueness. "Good faith," as defined in this legislation, by the terms "fair," "equitable," and "ethical" is not a legally sufficient standard. Thus, the bill has as its foundation no discernible objective standard to prevent its arbitrary and abusive application. Since it will itself invite arbitrary application, it is itself an unfair, inequitable, and unethical expression of government intrusion in business relationships.

Further, the substance of Section 2(8) already exists for a dealer's protection, by virtue of the ability of any party to void a contract entered into on the basis of fraud. Virtually any one of the phrases and triable issues set forth above can involve thousands of dollars in pretrial discovery and weeks, if not months, of trial time as experts for both sides seek to convince the court of the validity of their respective positions.

I would hope that this committee would want no part in the enactment of legislation that would further increase the litigious nature of our society and further overload our judicial system when the basis relief needed boils down to a simple act on the part of the manufacturer and/or the dealer. If you don't like the deal—put your pen back in your pocket!

CCIA's member companies are further opposed to this bill as it would require separate agreements for each separate product sold by a company's dealer representatives. This requirement is not only unmanageable, it is inconsistent with the needs of business, and will simply add to the costs and complexity of doing business. The clause in Section 201(a) which provides for additional unearned compensation at the end of a dealer agreement is simply a windfall to dealers, adding to the costs of doing business and increasing product prices. It also creates an undefined "contingent liability" on the books of the manufacturer that can be avoided only by refusing to market through dealers.

The net effect of S. 286 is to guarantee that no supplier can make changes which affect a dealer or his territory without being tied up in court.

Dealers who prefer an exclusive sales environment have as an option manufacturers/distributors who provide that kind of protection. Those who choose the non-exclusive environment should be willing to live within the context for which they bargained—enjoying the benefits of the unrestrained market in which they do business.

Speaking for myself, and for CCIA's 70 member companies, the Office Machine and Equipment Dealers' Act is unnecessary and unworkable. We urge the Committee to reject this legislation.

STATEMENT OF ALLEN R. FERGUSON, CHAIRMAN, NATIONAL INSTITUTE OF ECONOMICS AND LAW

I want to express my appreciation to the Subcommittee and the Chairman for this opportunity to present a statement on S. 286, the Office Machine and Equipment Dealers Act.

I am Allen R. Ferguson, President of the Public Interest Economics Foundation and Chairman of the National Institute of Economics and Law. As an economist with several decades of experience in policy research in government, academia, private industry and research institutions, I have had extensive experience in applying economic analysis to problems of many industries, in particular dealing with issues of governmental regulation and other intervention in private markets. However, I do not claim expertise in the specific details of the office equipment industry and its distribution system.

The major purpose of the Foundation and the Institute which I represent is to provide competent and objective economic information on and analysis of public

policy issues in an effort to advance the public interest. Brief descriptions of both the Foundation and the Institute appear as appendices to this statement.

Analyses performed by the Institute's staff in consultation with members of its Board of Advisors had led to the conclusion, during 1982, that a number of bills then pending before Congress would reduce both the effectiveness of the antitrust laws and the efficiency and equity with which markets perform. Consequently, we concluded that their enactment would be contrary to the public interest. We, therefore, sought funding from private parties who shared our opposition to those bills. The Retail Dealers' Agreement Act was one of those bills; the Coalition for Competition was one of the parties approached. That coalition has made a grant to the Institute to cover much of the costs of the reseach underlying this statement. However, the testimony is solely the responsibility of me and of the Institute.

My statement covers five areas: the salient economic aspects of the bill; the impacts of implementation upon entry and exit and on prices; other predictable consequences; some arguments in favor of the legislation, and, finally, conclusions.

Before proceeding, I call the committee's attention to Exhibit 1, below. It is a statement in opposition to H.R. 1159 and S. 286 endorsed by eleven economists. The signers include some of the most distinguished members of the profession, a former president of a major university, a recent president of the American Economic Association, several members of the Council of Economic Advisors under both Democratic and Republican presidents, as well as prominent scholars in the field of industrial organization. In addition, I call your attention to an excellent analysis of last year's version of this legislation: "The Retail Dealers' Agreement Act: An Unwise Backward Vertical Restraint" by Professor Anthony J. Greco of the University of South Alabama.

A. CONTENT OF S. 286

The features of the bill likely to have the greatest economic impacts are identified here before I proceed to discuss the economic implications of its passage and implementation.

In general, this is another in a series of special-interest, anti-competitive bills that various industrial groups are pressing on the Congress. In light of the need to provide means of stimulating greater productivity and equity throughout the economy, I urge that such special-interest legislation be subjected to the most penetrating scrutiny by this and the other responsible Committees of Congress.

The bill is extremely broad in scope. It applies to "any physical object or office machine software . . . designed primarily for use in an office environment" and whose retail price is $100 or more [Sec. 2 (10)]. There are a few exceptions, the most important of which appear to be furniture, textiles, and medical, dental and telecommunications equipment. Thus, S. 286 and the virtually idential House bill, H.R. 1159, cover such products as computers, software, typewriters, copiers, electronic cash registers and word processing equipment, according to Senator Exon [Congressional Record, January 31, 1983, S719]. Given the wording of the bill, it appears that far more items are included, such as drafting and dictating equipment, but most important in terms of predicting its effects, the bounds of coverage are not clearly specified.

The bill encompasses, with important exceptions, all dealers in such products who operate under a written or oral ageement with a supplier. The exceptions are, first, dealers who are not ". . . primarily engaged in the business of selling any office product . . ." [Sec. 2 (2)], (emphasis added) and franchises. The suppliers are also covered.

The ability of suppliers to terminate dealer agreements is directly restricted. In cases where agreements have no explicit termination date or suppliers seek to terminate prior to such date, the bill requires that they provide at least sixty days' notice. Further, suppliers are required to pay ". . . fair and reasonable compensation for the value of the dealer agreement to the dealership". Such value is to include ". . . a reasonable amount for goodwill . . ." [Sec. 201(a)]. Dealers can request binding arbitration and can seek injunctive and other relief in federal court, if they are dissatisfied with the proposed compensation [Sec. 201(e) and Sec. 301]. Suppliers are required to act "in good faith" in negotiating, complying with, terminating or refusing to renew an agreement [Sec. 101(4)]. Again, dealers have access to injunctive and other relief in federal court. These requirements apply to any dealer agreement written or oral, ". . . for a definite or indefinite period . . ." [Sec. 2(3)].

The final provision to be mentioned here is that the bill makes delay a federal offense; in Section 101(3) Congress would mandate that suppliers provide dealers with products, parts, manuals and drawings ". . . on a timely basis; . . .".

B. MAJOR CONSEQUENCES

One problem with the bill is that it is so sweeping and imprecise that the full range of its effects are difficult to determine and impossible to measure in advance. For example, the requirement that all agreements, including oral ones, be implemented or terminated in "good faith" appears vague to a layman. Similarly, the requirement that compensation be paid upon termination for the "value of the agreement to the dealership . . .", especially with the inclusion of goodwill as a component of such value [Sec. 201(a)], appears to encourage a wide range of potentially disputatious interpretation. There are more or less agreed methods for determining the market value of an asset, the problem of determining the value of an asset to its owner is a vastly different economic problem.

In spite of this vagueness, it is possible to analyze in qualitative terms how the impacts would move through the economy.

To put that analysis in perspective, it is important to note that the kind of federal intervention proposed in this legislation is rather novel in the American experience. Traditional forms of economic regulation have involved setting prices, regulating quality and imposing conditions on entry and exit. Rather cryptically, regulated industries were arguably characterized by attributes such as:

Great economies of scale (railroads, public utilities); public service aspects of the industry (trucking companies and financial institutions); a tendency toward natural monopoly (again, railroads and public utilities); or analogy or rivalry with previously regulated industries in the same sector (airlines, water transportation and trucking).

There is no evidence that retailing of office equipment and related products has any of these characteristics. Indeed it is apparent that it does not.

In addition, in recent years it has become evident that many of the regulated industries do not, in fact, have most of these characteristics and that those characteristics are not, in many cases, suitable bases for such intervention. As a consequence, Congress has dramatically reduced the role of price and entry regulation in one regulated industry after another.

A major development that contributed to the climate that made such far reaching legislative reform possible was the near unanimity among informed and disinterested economists of the belief that the success of the American economy depends, in significant part, on a policy of not providing protection to particular industries or corporations to preserve the status quo.

Implementing the proposed legislation would be contrary to both the highly desirable trend toward economic deregulation, as well as to general reliance on the free market system.

In addition, the bill constitutes poor industrial policy. It would tend to make growth, expansion and innovation more difficult in one of the rapidly growing sectors of the American economy. It would tend to inhibit one of the "winners".

ENTRY AND EXIT

The major direct impacts of the legislation are the inherent restrictions on the flexibility of suppliers in creating and maintaining their distribution systems. New artificial barriers to entry and exit would be created. Other impacts, many of which derive from these, are also predictable.

The most apparent direct effect of the legislation would be to constrain suppliers in discontinuing agreements with existing dealers. Obviously, the requirement that, in many circumstances, suppliers must offer compensation upon termination of dealer agreements raises the cost of discontinuing such agreements. For any supplier who is seeking to maximize profits or efficiency, this would mean that it would tolerate an, at least marginally, inefficient dealership, if the cost of doing so were less than the expected costs of compensation and any associated litigation or arbitration.

Similarly, the requirement that sixty days' notice be provided may impose costs in the form of delaying the implementation of a supplier's new distribution plan, presumably one that management judges to be more efficient than the existing one.

Less obviously, the requirement that suppliers operate in "good faith" in terminating or, even, in failing to renew an agreement can be expected to inhibit discontinuing existing agreements. Clearly, any problem arises not because parties to agreements should fail to behave in good faith. They arise because the vagueries of the term, especially in terminating oral agreements, leave suppliers open to costs of possible litigation or to delay [Sec. 201 (b)-(e)]. Again, the decision to discontinue an agreement would have to be based on a new calculation, and the decision would be made rationally only if the expected gains from the change were so great as to

offset the costs and risks inherent in facing a possible allegation of acting in bad faith.

The result of these effects is that suppliers would find it more difficult, more costly and more risky to prune inefficient dealers from their retail networks. Thus, the routine exiting of less efficient businesses in response to market forces would be impaired.

Symetrically, the bill would establish new barriers to entry. Although the direct restrictions imposed on the initiation of new dealer agreements that were present in S. 1256 in the 97th Congress [Sec. 3] do not appear in the current bill, the more subtle constraints in S. 286 may still be highly effective.

First, the difficulties of discontinuing any agreement, once it is established, means that a supplier would have a strong motive to be more than normally cautious about entering into new agreements.

Second, the requirement that suppliers "act in good faith in . . . complying with any term or provision of . . ." an agreement [Sec. 101(2) and Sec. 2(3)] could raise serious problems. An existing dealer, operating under an oral agreement could, it appears, allege that the unwritten agreement granted exclusive territoriality. In that case, the bill seems to offer an opportunity to dispute the initiatin of an agreement with another dealer in a marketing area already served by an existing dealer.

COSTS

These inhibitions on adjusting distribution systems in the office equipment industry would have adverse impacts on costs both within that industry and throughout much of the economy.

Within the industry, costs would tend to rise for several reasons. First, suppliers' uncertainty and risk would tend to be increased by the legislation. The scope of litigation is, if the legislation has any real effect, greatly increased. Delay, regardless of cause, in furnishing products and supportive paper work is made a federal offense. Further, negotiating, operating and terminating agreements are all placed under an enforceable requirement that suppliers act in good faith. To repeat, especially, the fact that this requirement extends to oral agreements appears to a non-lawyer to present almost unlimited opportunities for litigation, with corresponding risk to suppliers.

Risk translates directly into cost: greater risk requires greater returns to make an investment worthwhile. Therefore, the cost of capital to the office equipment industry (and all the other industries affected by the legislation) would tend to rise.

Second, delay—through the notice requirement and, probably more important, through litigation—has an analogous effect on capital cost. The requirement that additional time be spent in changing the distribution system would mean that some suppliers would have to hold greater inventories or retain inefficient dealerships longer than would be justified by market forces alone.

Third, the tendency to retain inefficient dealers would directly raise the costs of retailing and servicing the affected products.

Fourth, the requirement that compensation be paid for termination of an agreement would directly increase costs.

Fifth, the greatest cost impacts might be expected to occur after some years. The rigidities introduced into the retailing of office equipment and related products would reduce the ability of suppliers to innovate in distribution and service. Any attempt to introduce a new system or strategy for these functions would potentially face the list of litigation issues to which I have already referred. In a highly dynamic, new and growing industry, such as the office equipment industry, restrictions on innovation of any sort can be expected to be highly destructive.

Sixth, by excluding franchises (as well, of course, as integrated distribution systems) the legislation provides artificial incentives for the industry to integrate vertically. Whatever the merits of vertical integration introduced in response to market forces, any such action in response to governmental regulation to protect one segment of an industry from competition can be expected to be inefficient.

Seventh, similarly, by excluding dealers whose business is not primarily ". . . selling any office product of a supplier to an end-user . . ." the bill, again, introduces an artificial distortion into the distribution system. It does so by providing suppliers with an incentive to increase their reliance on department stores and other general dealers relative to their reliance on specialized dealers in office supplies and equipment. There is, of course, no presumption that specialized dealers are necessarily more efficient than more general distributors, but any statutory inducement to make less use of specialized dealers than would be indicated by market forces is likely to be a source of inefficiency resulting in increased cost.

PRICES

The increases in costs just discussed would tend to be reflected largely in increased prices charged by suppliers. There are in theory three options: prices charged must rise; profits in the supplier industries must fall, or incomes of labor and other providers of inputs into the production process must be reduced. To the extent that the industry, particularly that segment of it that uses independent dealers, is competitive the burden would tend to be borne by purchasers of equipment and perhaps by workers. It would require extensive analysis to estimate the division of the burden between those groups.

There are also two factors that would tend to raise prices by more than the increase in suppliers' costs.

First, defining an office product as a good or service that, inter alia, has a retail price of $100 or more [Sec. 2(10)] provides an incentive to retailers to raise the prices of goods or services (such as maintenance) that would normally sell for somewhat less than $100 to that level, in order to attain the protections provided in the bill. The fact that it is the retail price that is important in determining whether a product is covered by the bill is, incidently, another source of uncertainty for suppliers.

Second, and probably more important, the bill would tend to grant market power to existing dealers. The suppliers' difficulties in terminating dealerships would relieve dealers of one pressure to be competitive or to comply with suppliers' selling or servicing protocols. In addition, risks and costs of initiating new dealers would protect the existing ones from the consequences of both operating inefficiently and charging prices above the competitive level. For example, dealers would be freer than otherwise to raise some prices artificially to $100, because the constraints on competition in particular market areas would make it more difficult for rival dealers to underbid each other.

Dealers, obviously, can be expected to exercise such market power to raise prices to above the competitive level.

The economic consequences of these cost and price increases would permeate the economy. Virtually every business enterprise and governmental agency would be affected by increases in the prices of office equipment and related products. Each business would have a motive for passing on the consequent increase in its own costs, either to consumers as higher prices or to workers as reduced compensation. Each industry would be made marginally less efficient by the artificial stimulation of the prices of this ubiquitous set of inputs. Government agencies, which purchase a large amount of office equipment would, similarly, be faced with the choice of raising revenues or reducing services.

C. OTHER CONSEQUENCES

The Act would have a number of other consequences that can be quickly summarized.

Through increasing the incentive for vertical integration, the bill might well serve the interests of particular suppliers. For example, by making the use of independent dealers more costly and more risky, the bill would provide a competitive advantage to those manufacturers who use franchises or who, like IBM, have integrated service facilities and retail distributors.

One of the least evident but most pernicious aspects of the legislation is its potentially precedent-setting effect. We can confidently expect that, just as the soft-drink bottlers' bill in the 96th Congress led to the malt beverages bill in the 97th Congress, and reintroduced in the present Congress, legislative success of the Office Machine and Equipment Dealers' Act would give rise to further efforts by special interests to establish economic fiefdoms of their own. One can envisage similar efforts in such commodities as appliances, sporting goods, furniture and, perhaps, even automobiles. In the aggregate these could have large adverse impacts on economic efficiency in general as well as on productivity and consumer welfare.

D. COUNTER ARGUMENTS

Despite these predictable adverse impacts of S. 286, several arguments are advanced in its favor. Some of them justify attention.

The bill has sometimes been put forth as small business legislation. In fact Senator Exon, in introducting the Senate version S. 286, did so. Upon examination the argument is found to be, at best, questionable. The bill would, as discussed extensively above, work to the advantage of present, established dealers. New businesses—almost inevitably small—seeking to enter the field would be discriminated against. Similarly, becasue the bill tends to discriminate in favor of fully integrated

suppliers, the opportunities for independent dealerships (eventually even presently existing ones as well as new ones) might be eroded. Further, for the same reason, new small manufacturers might find it more difficult than at present to enter the field. Their entry would be inhibited additionally by the added risk and costs of establishing agreements with independent dealers, upon which new manufacturers would often need to rely.

Similarly, given the costs and risks of canceling agreements once they are established, suppliers may find it to their advantage to make or retain retailing networks based only on well-established dealers, perhaps chain outlets rather than either small or new dealers. At the same time, the premium that the legislation would place on a dealer's ability to litigate—to gain effectively from the protections provided in the bill—would tend to work to the disadvantage of businesses too small to engage in extensive legal actions. All these characteristics of the legislation would work to the disadvantage of small businesses seeking to enter or merely to survive as dealers in office and related equipment. Further, it will discriminate against the independent specialized retail dealers in office equipment in favor of large general distributors and retailers, such as department stores, or possible distributors of other commodities, such as household appliances or automotive parts, especially those with national organizations. This follows from the definition of "dealer" [(Sec. 2(2)]. There is a quite relevant analogy according to Professor Robert B. Reich, writing in The Atlantic Monthly in March 1983, "Korean television manufacturers, for example, have gained a sizable share of the U.S. television market by selling to no more than a dozen large American department-store chains" (p. 45).

Whereas, the bill would, as discussed above, make it more difficult to prune inefficient dealers, it is equally true that it would also make it more difficult to prune efficient dealers. Although the symmetry of this logic may have some aesthetic appeal, it is difficult to see why profit-seeking suppliers would prefer inefficient to efficient dealers. Further, if a dealer were in fact efficient within one distribution system, overall efficiency of the suppliers' organization might require structural change, including the elimination of individual dealers in some cases.

An additional argument is sometimes made to support barriers to entry of the sorts embodied in this legislation. The argument is that the existing dealers need protection from new dealers who might "free ride" on advertising, showroom education of the customer and other investments made by the existing dealers. Under some assumptions, the argument is theoretically valid. However, so far as I am aware, no case has been made that in the present instance the problem arises. Further, in any case where it is important, a well-functioning market would induce the development of businesses specializing in those particular services to users of office equipment, encouraging formation of specialized consulting firms.

One argument remains to be discussed. This Act would be least greatly reduce, if not eliminate, intrabrand competition. It is sometimes argued that a reduction in intrabrand competiton is justified if it contributes a large enough increase in interbrand competition. However, in this case, I know of no persuasive evidence that interbrand competition would be increased by the passage of the bill. Further, Professor Greco argues that in the present context,

"... intrabrand competition is more meaningful ... because it is a lot easier ... to compare the prices of different distributors of the same brand ... that ... to compare the prices of different brands of a product. Hence, the act would infringe on the economic 'rights' of consumers to the availability of meaningful competition." (op. cit., 8)

E. CONCLUSIONS

S. 286 is another piece of special-interest legislation that would reduce efficiency and increase costs in the American economy. It would increase the costs and risks of suppliers of office equipment and related products. It would increase the market power of dealers and place them in a position to charge greater than competitive mark-ups. The consequent increase in prices would permeate much of the economy.

At a time when there is a need for increasing the efficiency and productivity of the American economy, such impacts would be particularly inappropriate.

Further, the act is incompatible with reliance either upon the free market system or with industrial policy designed to increase economic efficiency and employment. It injects governmental regulations into industrial activity solely in the interest of a small group of commercial interests.

The legislation would produce no predictable general economic benefits to offset the costs. The act woud tend to benefit only existing dealers, and it would do so not only at the expense of consumers and manufacturers, and possibly workers, but par-

ticularly at the expense of small businesses seeking to become office equipment retailers or manufacturers. It might well also work to the disadvantage of smaller current dealers vis-a-vis both the larger and better established dealers, chain stores and other large general retailers or distributors and those suppliers who do or would rely on integrated or franchised retail operations. The news fields of litigation and the vagueries in the Act might well mean that lawyers are the primary beneficiaries of its implementation.

For all of these reasons, in the interests of the public at large, the bill should be rejected by this Committee and by the Senate.

STATEMENT OF DAN P. SCOTT, PRESIDENT, DAN P. SCOTT & SONS, INC., TULSA, OKLA., AND PRESIDENT OF THE NATIONAL OFFICE PRODUCTS ASSOCIATION

Mr. Chairman, Members of the Subcommittee, the National Office Products Association is an industry-wide Association which represents all segments involved in the distribution of office products. Given this base, we are most interested in the stability of the industry and the continual prospects for profitable growth and expansion of all member companies.

Our analysis of the Office Machine and Equipment Dealers' Act (S. 286) leads us to believe that those interests would be threatened by enactment of this legislation.

We analyzed the legislation from the viewpoint of the office products dealer, the manufacturer and the wholesaler in order to assess its impact.

The impact it would have on manufacturers and wholesalers is readily evident and apparent. From this perspective, the legislation establishes a legal mine field, fraught with uncertainty involving contractual agreements, and demanding the utmost in caution in marketing through dealers. The legislation imposes so many vague and ambiguous standards, or requirements, on manufacturers' and wholesalers' establishing, terminating or not renewing dealers that the propsects for protracted litigation among member companies seems highly probable. We believe this would, in turn, seriously threaten the stability of the entire distribution system.

We have chosen not to cover the numerous vague and ambiguous standards or requirements imposed by this bill on manufacturers and wholesalers in this statement. In a recent (undated) letter to the Chairman of the Judiciary Committee of the House of Representatives, Peter Rodino, Jr., Federal Trade Commission Chairman, James C. Miller, addresses these problems in those paragraphs arguing that provisions of the bill may be anticompetitive.

Instead, we choose to emphasize the impact the legislation would have on office product dealers. It is important to emphasize that dealers constitute the majority of our membership, held all chief elected national offices and maintain majority control of Association committees, all in accordance with the bylaws adopted in 1904. The impact this legislation would have on dealers was weighed heavily. I also want to emphasize that the weight given the dealer viewpoint was all the more important because of the nature of the bill and its pointed and specific application to office products dealers.

To summarize, we do not believe that dealers could either actually or ultimately benefit from enactment of the legislation. The word "ultimately" is probably the most important. Our major conclusion is that enactment would tend to force manufacturers to be highly selective in choosing the dealers with whom they will do business. This, in turn, will limit the number of dealers who will be able to obtain product lines. And because office product dealers are now and will be continuing to look at new product and machine lines for increased profits and market share, the bill presents a major obstacle to their growth and diversification. Again, we concur with F.T.C. Chairman James Miller's comments to Chairman Peter Rodino regarding the significant barriers to entry the bill creates.

An understanding of the office products industry and the changes taking place within it are crucial to understanding why we are so deeply concerned about the obstacles this bill places before dealer growth and expansion and why this is such a major problem and conclusion from the dealer perspective.

Recently, the Association completed an extensive study with Stanford Research Institute that details future growth in the industry. Among some of the pertinent conclusions found in the study are:

"The office products industry is composed of three primary business groups—office supplies, office furniture, and office machines.

"—the total end-market for office products in this country is expected to grow in constant 1977 dollars over the course of the 1980's at an average annual rate of 11 percent.

"—the end-market value of office supply sales is expected to grow from $14.5 billion in 1977 to $32 billion by 1989 at an average annual rate of 7 percent.

"—the end-market value of the office furniture and furnishings sold is expected to grow from $2.4 billion in 1977 to $10 billion by 1989 at an average annual rate of 12 percent.

"—the end-market value of office machine sales and rentals is expected to grow from $17.6 billion in 1977 to $83 billion by 1989 at an average annual rate of 14 percent."

As you can see, those areas where growth is expected to increase the most dramatically are in furniture and machines. The study goes on to say, and I quote:

"Depending on a dealer's resources, major diversification opportunities will exist in the office open plan systems and budget furniture markets *and in the office machine market. Technology and manufacturers support programs should make office machines a much more appealing business to the dealer.* (Emphasis added.) Technology will also create opportunities for the dealer to diversify into office machines based services, and computers will increasingly be used to provide trade services to lock in account relationships.

". . . for the office supply dealer (whose market is expected to grow at an average annual rate of less than 8 percent) higher growth can be achieved by taking on machine supply lines, emphasizing contract customer services and walk-in, mail order and telephone selling programs, and diversifying into office furniture, *office machines* (Emphasis added) and office services."

The nature of this industry is changing rapidly. We expect that by the end of the decade, the product based distinctions that currently separate the industry into "business groups" will not be as apparent. Traditional office products and furniture dealers will be selling some machines and as our study points out, office machine dealers will be selling some supplies and furniture.

We believe dealers should have the ability to make those choices freely.

However, enactment of S. 286 could impede that freedom to the extent it discourages manufacturers from selling to new dealers, or selling through dealers at all. Likewise, such a state of commerce could discourage dealers from moving into machine and high technology areas at just the point in time when that move should be made to insure future profitability and market share.

Many are in the midst of that decision now.

Machines and high technology are creating a revolution in more than just the offices of this nation. The are revolutionizing the office products industry itself. In fact, new office supply and furniture product introductions are at an all time high and may far outpace the incredibly rapid introduction of electronic hardware.

Provisions in the legislation exempting furniture or office products with a retail price of $100.00 or less assume the industry is not changing or that new and more expensive products will not be developed or introduced. We seriously question the long-term viability of these exemptions and the wisdom of writing specific dollar amounts into exemptions under this Federal law for an industry undergoing such profound changes.

But these exemptions (while significant in view of past versions of this legislation) are not the main issue. The issue remains whether Congress should adopt a law which tends to stifle dealer expansion.

Again, we believe dealers, as well as manufacturers and wholesalers should have the ability to make choices about their future freely and without fear that a vaguely written Federal law might be violated unknowingly.

As a representative of small business, the National Office Products Association has a long history of supporting the free market system in this nation. And the relative freedom from over-regulation this industry has enjoyed over the years has, in our opinion, permitted us to become one of the most stable, solid and growth-oriented industries in America.

To entertain the idea that contractual relations among our members should now be governed by this new Federal law would constitute a severe departure from tradition. We trust the Subcommittee will take this into consideration during their deliberation.

We appreciate the opportunity to provide the Subcommittee with our views regarding S. 286.

STATEMENT OF GARY J. SHAPIRO, COUNSEL TO THE CONSUMER ELECTRONICS GROUP OF THE ELECTRONIC INDUSTRIES ASSOCIATION

I. INTRODUCTION

The Consumer Electronics Group of the Electronic Industries Association (EIA/CEG) represents manufacturers of consumer electronics products, including television receivers, radios, phonographs, audio systems, tape recorders, video games and home computers. The 70 members of EIA/CEG represent over $12 billion in factory sales. EIA/CEG and its members oppose S. 286, the Office Machine and Equipment Dealers Act (the Dealers' Act).

II. WHY EIA/CEG OPPOSES THE DEALERS' ACT

The EIA/CEG is a trade association representing manufacturers of consumer electronics products seemingly not affected by passage or defeat of legislation covering office equipment manufacturers and dealers. Yet, it remains opposed to S. 286 and similar legislation. Here's why:

A. Some EIA/CEG Members Manufacture Products Which Are Often Used in Offices.—The line between consumer products and office products is extremely fine and is becoming increasingly finer. For example, EIA/CEG members manufacture and distribute products such as home copiers, microcassette recorders, dictation machines, audio and video tapes, projection equipment and personal computers. While EIA/CEG believes that most of these products are clearly exempted from the definition of "office products," a disappointed dealer could conceivably burden a supplier with substantial litigation fees in an effort to prove otherwise. Thus, EIA/CEG remains opposed to the Dealers' Act, but also asks that the definition section be clarified to exclude these products.

B. The Dealers' Act Would Cause Confusion Among Those Who Distribute Office Products and Other Products.—Many EIA/CEG members manufacture or distribute both consumer electronics products and "office products." Often these products move through similar distribution channels. Passage of S. 286 would cause confusion among these manufacturers as it would force them to alter existing distribution patterns for certain products and retailers.

C. The Dealers' Act Would Set a Bad Precedent.—S. 286 injects the government into marketplace distribution decisions by restricting the ability of manufacturers to terminate dealers and by imposing additional costs on suppliers who distribute through dealers. As such, it represents an unprecedented governmental incursion into an area where the free market traditionally has operated within the bounds of state law and federal antitrust law. EIS/CEG opposes S. 286 for the same reason it opposes the Sales Representation Contractual Relations Act (H.R. 3591). The consumer electronics industry is highly competitive and any additional government mandated burdens are anathema to consumer electronics manufacturers and contrary to the current trend of less federal regulation.

D. The Bill Would Hurt High Technology Firms.—The consumer electronics industry is a vibrant growing industry with expectations of a healthy future. This industry is relying on small high technology firms to provide advances and breakthroughs in electronics technology. These firms would be severely restricted by the Dealers' Act as it would limit their ability to aggressively market new products. Lacking an established distribution network or access to capital, it is these companies which would be most unable to establish company owned supply outlets. They would thus be forced into using dealers who could subject them to economic blackmail under the provisions of the Dealers' Act.

E. The Dealers' Act is Poor Public Policy.—For reasons explained immediately below, the Dealers' Bill is bad legislation from a public policy standpoint. For this reason above and beyond the reasons mentioned above, EIA/CEG strongly opposes the bill.

III. WHY THIS SUBCOMMITTEE SHOULD OPPOSE S. 286

S. 286 appears innocuous. However, not only does it create a new federal cause of action, it would distort competiton and could have several unintended effects. This Subcommittee should consider the following problems inherent in the Dealers' Act:

A. It Is Based On Faulty Assumptions.—The Dealers' Act is based on two faulty assumptions: first, that there is unequal bargaining power between suppliers and dealers at the contract negotiation stage; and second, that this inequality results in substantial hardship to dealers which is not remediable under present law.

The intense competition among office equipment dealers for retail shelf space is similar to that in the consumer electronics industry. In both industries suppliers court retailers in the hope that they will carry the suppliers' products. And in both industries it is the retailers which choose from the many competing manufacturers rather than the other way around. This situation hardly gives rise to unequal bargaining power.

Even if suppliers could afford to be in the competitive position where they abuse or wrongfully terminate dealers, there is adequate protection of the dealers under current law. Recently, both the Department of Justice [1] and the Federal Trade Commission [2] relied on this fact when opposing S. 286 or its House counterpart (H.R. 1159). In fact, dealers have sued suppliers, often successfully, for both state law violations and antitrust law violations, the latter which provides treble damages.

B. It Is One Sided.—The Dealers' Act makes no pretense that even-handed treatment is intended. The Act provides no protection to manufacturers and suppliers. Title I of the Act, subtitled "Duties of Supplier" lists seven "duties" a supplier has to a dealer. Nowhere in the proposed legislation is there any indication that the dealer has any obligation, even that of "good faith," to the supplier. This unbalanced treatment is unfair and unjustified.

C. It Is Special Interest Legislation.—The Dealers' Act singles out one group and grants its a unique set of rights and privileges enforceable in federal court. Ironically, passage of this legislation would benefit only a group comprised of those who have handsomely profited from the existing distribution network under present law.

D. It Would Reward Inefficiency.—The Dealers' Bill requires that suppliers provide compensation for "goodwill" when terminating a dealer. The legislation also prescribes a complex procedure, which would typically involve arbitration or litigation in determining compensation. No matter what procedure is used, the very presence of a legislatively mandated value on "goodwill" would make it costly and difficult to terminate dealers who by any measure should be terminated. Dealers who provide inadequate or poor servicing, dealers who have not paid the supplier amounts owned, dealers who disparage the supplier's products, and even dealers who have violated criminal statutes would all be protected under the Act. These dealers would, under the provisions of the Act, have the economic incentive to coerce suppliers into large cash settlements as this would be the quickest way a supplier could obtain a termination of the dealer-supplier relationship. Clearly, it is poor public policy to pass legislation which rewards the incompetent, the inefficient, or the illegal.

E. It Would Burden Federal Courts.—S. 286 not only creates a new federal cause of action, it encourages litigation. Non-performing dealers who suppliers seek to terminate would have strong incentives to litigate over the amorphous "good faith" requirement or "goodwill" valuation. This Subcommittee should be careful before supporting legislation which would further clog the over-worked federal judiciary system.

F. It Would Encourage a Supplier To Own Its Outlets Instead of Using New and Existing Dealerships.—The Dealers' Bill would restrict the ability of a supplier to terminate a dealer. It would also create unknown and unknowable costs for "goodwill" and for legal fees to resolve disputes involving dealers. These costs must be calculated into the supplier's financial decision to enter, modify or renew dealership agreements. As the cost of doing business through dealers increases, so does the likelihood that the supplier will establish its own retail outlets.

G. It Would Hurt Consumers.—The effect of this legislation on consumers cannot be dismissed. The Dealers' Act would cause price increases and service deficiencies for the thousands of consumers of office products, including EIA/CEG and each of its members. By restricting manufacturers from acting quickly in response to changing market forces, by imposing additional costs on office product manufacturers and by protecting inefficient or low quality dealers, the Dealers' Act guarantees higher prices and poorer service to consumers of office products.

H. It Is Opposed By Many Diverse Groups.—The Coalition for Competition, of which EIA/CEG is a member, is comprised of a diverse group of manufacturers, retailers, consumers and public interest groups opposed to the Dealers' Act. The Coalition provides solid evidence of the breadth of opposition to this legislation. In addi-

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[1] See letter of Robert McConnell, Assistant Attorney General, Legislative Affairs, to the Honorable James Florio, Chairman, Subcommittee on Commerce, Transportation and Tourism, Committee on Energy and Commerce (August 8, 1983) pp. 4-5 (opposes H.R. 1159).

[2] See statement of George W. Douglas, Commissioner, Federal Trade Commission, before the Subcommittee on Consumer, Committee on Commerce, Science, and Transportation, (September 14, 1983) p. 1 (opposes S. 286).

tion, the Federal Trade Commission and the entire Massachusetts Congressional delegation have indicated their opposition to S. 286. And recently, the Department of Justice told the House Energy and Commerce Subcommittee on Commerce, Transportation and Tourism that it strongly opposed enactment of similar legislation (H.R. 1159) as it is "special interest legislation" which "would have anticompetitive results." [3] Clearly, this type of legislation is opposed by those who are charged with protecting our competitive marketplace.

IV. CONCLUSION

We ask this subcommittee to join us in opposing S. 286. The bill is unnecessary, inequitable and anticompetitive. It substitutes a dealer welfare program for the legitimate disciplines which are an integral part of any sales operation.

Dealer motivation is likely to be eroded by the protection offered by S. 286. The competitive distribution structure which has been the cornerstone of our industry (and this country) should not be changed now for the purported benefit of one special interest group.

Statement of Bernard Seltzer, Executive Vice President, Wholesale Stationers Association

I am Bernard Seltzer, executive vice president of the Wholesale Stationers' Association ("WSA"). We express our strong opposition to S. 286, the Office Machine and Equipment Dealers' Act. The bill would impose restrictions and limitations that are unnecessary and anticompetitive, and which would greatly disrupt the movement of many different types of products from the manufacturer to the end user.

Is there a real need for this legislation? WSA feels there is not. Moreover, a recent article appearing in the National Office Machine Dealers Association magazine suggest that, while problems did exist in the 1970's between suppliers and office machine dealers as to unfair contracts, most of them have been eliminated in the 1980's. (NOMDA Spokesman, July, 1983, pp. 14-15). A copy of the article is appended to this statement.

ABOUT THE WHOLESALE STATIONERS' ASSOCIATION

WSA is a national trade association whose members are wholesalers of all types of stationery and office products and supplies. WSA also has as associate members manufacturers of stationery supplies and office products.

The wholesale stationer stocks and sells stationery items and a wide variety of office supplies which in a modern, computerized distribution center can number some 20,000 to 25,000 different items. What was once a small industry now is on the threshold of a billion dollars in sales annually—through wholesaler distribution centers.

However, the industry is still small, both in number of wholesalers (less than 200) and in size of individual companies. Most do less than $10 million a year in sales so it is an industry of small businesses privately owned by individuals and families concerned with protecting the right of free enterprise.

S. 286 IS VAGUE, OVERLY BROAD, AND UNWARRANTED

As drafted, S. 286 reaches far beyond its ostensible purpose of protecting office machine dealers from the marketing practices of Japanese and other foreign office machine manufacturers. The bill is unwarranted and unworkable.

Section 2 (II) defines a supplier as a " . . . manufacturer, distributor or wholesaler engaged in commerce who enters into a dealer agreement with a dealer in order to supply the dealer with an office product." This definition fails to recognize the traditional functional differences between a manufacturer and the wholesaler. Wholesalers are not manufacturers; wholesalers depend on the manufacturer for the supply of the products which we sell to dealers. Our ability to supply a product to the dealer on a timely basis is wholly contingent on the manufacturer's production, shipping, and marketing decisions.

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[3] See letter of Robert McConnell, Assistant Attorney General, Legislative Affairs, to the Honorable James Florio, Chairman, Subcommittee on Commerce, Transportation and Tourism, Committee on Energy and Commerce (August 8, 1983) p. 9 (opposes H.R. 1159): See also statement of George W. Douglas, Commissioner, Federal Trade Commission, before the Subcommittee on Consumer, Committee on Commerce, Science, and Transportation (September 14, 1983) ". . . (S. 286 increases) the burden on competition and consumers . . ." p. 6.

Yet, the bill makes WSA wholesalers equally subject to the restrictions and limitations with absolutely no justification. The financial resources of a WSA wholesaler will be significantly reduced if monies are required to be spent in defending itself in litigation because of the sanctions imposed by S. 286 instead of building and expanding our businesses.

NO WORKABLE DEFINITION OF DEALERSHIP AGREEMENT

Under section 2 (3), a dealer agreement is defined as " . . . any written or oral agreement or contract between any supplier engaged in commerce and any dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract, for a definite or indefinite period." This definition covers the waterfront to encompass virtually any relationship, oral or written, between a dealer and its supplier. It is certainly not inconceivable that a court would rule that the acceptance of a telephone order from a dealer by a WSA wholesaler creates a dealer agreement within the meaning of section 2 (3).

Given the vague and overly broad definition of dealer agreement, there is no practical way for a WSA member to know whether or not it has entered into a dealer agreement. Through a course of dealing with a dealer, or acceptance of a purchase order or telephone order, is the WSA member now subjected to the sanctions of the bill, including litigation in the federal courts?

SUPPLIERS SADDLED WITH UNREASONABLE AND ANTICOMPETITIVE OBLIGATIONS

The bill requires a supplier who enters into a dealer agreement to, among other things: (1) act in good faith in terminating, cancelling or refusing to renew the dealer agreement; (2) act in good faith in performing any term or provision of the dealer agreement; (3) act in good faith in describing and negotiating the dealer agreement; (4) furnish the dealer with any office product on a timely basis; and (5) in some cases give a dealer sixty days notice when a new dealer is put into the market area.

There is no practical way for a supplier to know when it can terminate a dealer for failing to pay promptly, or for providing poor service or promotion for the supplier's product, without litigating the matter in federal court.

By forcing a supplier to provide a dealer with any product made or sold by the supplier on demand, the bill obligates a supplier to provide future products developed after establishment of the dealer agreement. Furthermore, this requirement is imposed whether or not the product is contemplated by the dealer agreement and whether or not the supplier desires to market the product through that dealer.

The bill imposes unreasonable obligations on a supplier to furnish office products on a "timely basis" to dealers, even though delivery may be dependent on the performance of vendors and market conditions beyond a supplier's control. Indeed, those products in greatest demand will be the most difficult to supply on a "timely basis".

IMPROVEMENTS IN EFFICIENT DISTRIBUTION THWARTED

The cumulative effect of these features will be highly anticompetitive, creating contracts in perpetuity unless the supplier is willing to risk a disruptive and expensive court action, under vague standards, for failing to renew a dealer. Suppliers will become "locked-into" rigid, outmoded and unproductive dealer systems, or else face a lawsuit in federal court if they decide to make a necessary change.

GENERAL OPPOSITION TO "PROTECTIVE" LEGISLATION

Protective federal legislation applicable to office machine dealers has been vigorously opposed by the U.S. Justice Department, the Federal Trade Commission and nearly every business group as being anticompetitive, and leading to increased inefficiencies in distributional networks. Specifically:

1. The Federal Trade Commission has opposed the enactment of federal office product dealer protection bills because:

"(1) There was no sound basis for enacting the legislation, and

"(2) the newly-created dealer rights and remedies were anticompetitive, since

"(a) the lack of well-defined standards in the bill would result in decisions that conflict with the orderly and effective application of the antitrust laws to nonprice vertical restraints,

"(b) the 60 day notice requirement (by the supplier) and the right to obtain compensation or to sue (by the dealer) will lead to increased distribution costs,

"(c) the federal courts were given an adjudicative task for which they were ill suited, and

"(d) significant barriers to entry for dealers would be created where few now exist."

The FTC has also stated that such "protective" legislation would have an adverse economic impact on dealer-business opportunities, would result "in higher prices to the ultimate American consumer, and probably lead to decreased efficiency, innovation, and production." (Statement of Thomas J. Campbell, Director, Bureau of Competition, Federal Trade Commission; Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, September 8, 1982. pp. 2-3).

2. Most dealers have opposed, not supported, such protective legislation. For example, the National Office Products Association opposed federal office dealers protection bills as abhorrent to the free market system. It is instructive that NOPA represents 4,800 dealers and 2,000 sales representatives, the supposed beneficiaries of this protective legislation.

Also opposed was the National Retail Merchants Association and the American Retail Federation, collectively representing over 1,000,000 retail dealer establishments throughout the United States. These associations found no benefit to its members if such legislation were passed, and could ascertain no commercial or legal rationale for its passage.

These are strong, and perhaps surprising, positions for dealers to take on legislation intended for their benefit. The only logical conclusion—protective dealer legislation is detrimental to all links in the chain of distribution.

3. The Hawaii legislature requested, and received, the Federal Trade Commission views on Hawaii S.B. 904—a fair dealership practices law for the office machine industry. The FTC voiced its opposition: The bill's "additional legal protection against actions by their suppliers might be harmful to the value of the dealers' business investments" and "the bill's enactment would increase the monopoly power of existing dealers and would lead to increased inefficiencies in suppliers' distributional networks."

S. 286 IS CONTRARY TO FREE AND FAIR COMPETITION

The Department of Justice and the Federal Trade Commission oppose this bill as anticompetitive. We completely agree. Such legislation, if enacted, could give dealers considerable control over the types of products marketed in a specific area. Competition is the guiding factor in marketing. Consumers are entitled to the widest possible selection of goods on the most economical terms. S. 286 will jeopardize competition. In a broader sense, such legislation could also prevent the development and marketing of improved products and technologies which are to everyone's benefit.

Moreover, absent is any compelling need for federal intervention. State law already provides ample protections for resolving disputes between dealers and suppliers and for protecting dealers from the unfair marketing practices of competing suppliers.

CONCLUSION

On balance, this bill would greatly increase, not reduce, litigation with its related costs. It would discourage product line and geographic expansion for all components of the marketing chain, and stifle competition. The far-reaching ramifications of S. 286 leave WSA no choice but to strongly oppose it as a misguided proposal.

WSA appreciates the opportunity given to express our views on, and our opposition, to S. 286.

STATEMENT OF JOHN LOTTER, PRESIDENT, BUSINESS RECORDS MANUFACTURERS ASSOCIATION

Mr. Chairman and members of the committee, my name is John Lotter. I am President of Stationers Looseleaf Company of Milwaukee, Wisconsisn. I appear today in my capacity as President of the Business Records Manufacturers Association (BRMA), an association of 16 manufacturers of business record storage devices. Our members operate plants in 14 states and have annual sales in excess of $500 million.

With me today is John Preschlack, President of General Binding Corporation, Northbrook, Illinois, who is Chairman of our Government Relations Committee, and

David Palmeter of the law firm of Daniels, Houlihan & Palmeter, P.C., Washington, D.C., who is our Executive Director and general counsel.

BRMA is opposed to the Office Machine and Equipment Dealers' Act (S. 286) (the "Dealers' Bill"). We believe that the Dealers' Bill is anti-competitive and ill-conceived. It is inequitable, in our view, in its balancing of the interests between dealers and manufacturers. We believe that it is undesirable special interest legislation.

The Dealers' Bill assumes that there is imbalance in the bargaining strength between manufacturers and dealers; that manufacturers are large and dealers are small; and that manufacturers abuse this imbalance. We would challenge these assumptions.

Certainly imbalances between business entities exist in our economy, and in many instances manufacturers indeed are larger than dealers. But this is far from a uniform phenomenon. Many manufacturers in the United States are comparatively small firms—indeed many of them in the office products industry may qualify as small businesses. There are dealers, on the other hand, that are very large nationwide distributions organizations. The size of a business, and therefore its presumed bargaining strength, does not necessarily depend upon whether the business is a manufacturer or a dealer. There are in the United States large and small versions of both.

A second factual underpinning of the bill, which we challenge, is that manufacturers, as a group, are unfair to dealers as a group, and therefore, dealers need special protection. We would not be so naive as to suggest that some manufacturers do not at times breach their good faith obligations to dealers, but this is hardly a one-way street. Manufacturers too must contend with dealers who do not live up to their good faith obligations under agreements. Dealers, for example, have been known to disparage a manufacturer's product in order to promote a competitor. Often dealers simply do not perform as well as they promised.

All of this is not new. All of this has been going on for years in a miniscule fraction of the countless thousands of successful manufacturer-dealer agreements that are in force in this country everyday. The comparitively few disagreements, whether they concern alleged breaches by manufacturers or by dealers, have been adequately dealt with by existing law.

It is for this reason that we think the Dealers' Bill is fundamentally unsound. Since individual problems between dealers and suppliers are being appropriately resolved already, there simply is no need to move these disputes into the federal courts—to make, if you will, "a federal case" out of them. At a time when the Chief Justice of the United States tells us that the federal courts are clogged and overburdened, these purely commercial disagreements between businesses do not belong in the federal courts under a new federal right of action.

This is a point we would emphasize: the Dealers' Bill would police purely commercial disputes between businesses, between professionals whose contractual arrangements have gone awry. It is one thing for the federal government to pre-empt an area from the states in order to protect those who are unable adequately to look after their own interests in the marketplace, such as consumers and other individuals—non-professionals. But it is something entirely different for the Federal Government to pre-empt an area from the states when the parties involved, all professionals, are capable of looking after their own interests—or else they do not belong in business.

The provisions of the Bill would limit the manufacturer's freedom to terminate a contract with a dealer who is not performing adequately. They would restrict a manufacturer's right not to renew a completed agreement. We are very much concerned that in circumstances such as these, the bill will operate as an invitation to disgruntled dealers to sue or threaten to sue simply to collect settlement payments from manufacturers who would find the presentation of an adequate defense too expensive an exercise to go through. In other words, the bill could act as an invitation to "blackmail."

The problem of termination or non-renewal has become even more acute when it is considered that many manufacturers have many product lines, and are adding to these lines constantly. Some of their products are some being handled by the same dealers, some by different dealers. How does one resolve the existing dealers' "rights" under the Bill to continue to be a dealer in new products? One obvious way to handle these difficulties is the way the trade handles them now—through specific contract provisions, and not through general legislation that would apply across the board.

The Dealers' Bill inequitably discriminates against manufacturers in the office products industry by imposing on us—and not other manufacturers—the special terms and conditions of the Bill. Only manufacturers in the office products industry

would have to deal with the new federal court action, or comply with the many new and unclear terms of the Bill, which, we fear, could create a legal mine field for any manufacturer seeking to market his products through independent dealers. Furthermore, it could very well be that this proposed legislation is not in the dealer's interest either in that it may force manufacturers to seek alternate forms of distribution, as has been the case in several European countries where the government has set similar constraints on manufacturers.

We submit that there simply is no pressing commercial or legal need for this legislation. Individual problems between dealers and suppliers have been and are being adequately resolved by individual negotiations according to each unique circumstance. State contract law, and state and federal antitrust laws are more than adequate to adjust the rights and duties between the businesses, and keep the channels of trade open to fair competition. We urge the Congress to reject as unnecessary this legislation that would inject an unnecessary federal presence in the private dealings of professional businesses.

STATEMENT OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION

The Computer and Business Equipment Manufacturers Association opposes the passage of the Office Machine and Equipment Dealers Act, S. 286.

The Computer and Business Equipment Manufacturers Association (CBEMA) represents a highly competitive industry with new companies and products emerging at a rapid pace. During 1982, CBEMA's 42 member companies had revenues in excess of $75 billion, employed more than one million people worldwide, and had a trade surplus of $6.6 billion. CBEMA members engineer, manufacture, finance, sell and service business equipment, computer systems, software and supplies. Members' products range from office copiers and recordkeeping systems to word processing systems, microcomputers, printers and data processing systems.

Office equipment suppliers seek every vehicle available to get their products to the marketplace to meet the expected continuing demand. More sources for these products and services can only sharpen competitive activities. Today, there are approximately 30,000 office machine dealers in the country. Despite implications to the contrary, more and more American office equipment manufacturers, large and small, are, or will be, turning to office machine dealers to market many of their products.

S. 286 would deter this increasing use of dealers by manufacturers. Large manufacturers would expand their direct selling channels through their sales forces, or stores, even though these vechicles may not be the most cost efficient method of distribution of some of their products.

The result could be more serious for the small, emerging American manufacturers who may have no alternative channels but dealers to market their products. S. 286 can only discourage their plans for a rapid expansion of their dealer networks—these plans and projections being financially critical to their future. Consequently, the number of dealerships, primarily small businesses, would decrease. Consumers would unfortunately see the increase costs of selling business equipment passed onto them.

CBEMA opposes S. 286. Overall, we believe the Office Machine and Equipment Dealers Act is:

Anti-competitive and therefore harmful to manufacturers, wholesalers/distributors and potentially new office product dealers wanting to enter the marketplace; unnecessary, as the marketplace plus existing laws provide adequate remedies to problems; unfair, as the legislation is one-sided in the dealers' favor; and vague and uncertain, as resolution of disputes over concepts and terminology will be required in already overcrowded courts.

S. 286 IS ANTI-COMPETITIVE

The bill calls for payments to dealers when suppliers terminate or fail to renew dealer contracts. Thus, manufacturers who enter into dealer agreements would be discouraged from terminating a dealer arrangement that has not worked our satisfactorily, knowing that compensation in some amount may have to be paid. Threat of compensation also discourages manufacturers from seeking our new dealers. The result is that an existing dealer, who may not be the most efficient or effective, will be perpetuated and new dealers would be restricted from entering into competition or replacing an existing dealer. Less competitive office equipment dealers would obtain unfair geographical protection. This protection reduces competition among

manufacturers, wholesalers and distributors, causing product and service quality to deteriorate and likely resulting in increased prices.

Overall, the result of S. 286 would be to create a barrier to entry against new dealers resulting in increased consumer costs and negatively impacting the critical expansion and competition so vital to the office equipment sector of our economy. To this end, the Department of Justice and the Federal Trade Commission testified against predecessor legislation during the last Congress for its primarily anti-competitive aspects. The FTC has again reinforced its opposition to the legislation now before the Subcommittee.

The bill requires burdensome recordkeeping. The $100 or less office products exemption creates enormous recordkeeping burdens on suppliers. Suppliers would need to know product prices at all dealerships. "Sales" and "discounts" make this task almost impossible. Tracking retain sales prices would create a serious anti-competitive problem too. Manufacturers or distributors must engage in discussions with dealers over the retail prices of the products supplied—a most unhealthy circumstance which is clearly not sought by suppliers.

Therefore, S. 286 has basic anti-competitive characteristics that are fundamentally incurable. Its byproducts would be adverse for all levels in the distribution chain—including the consumer.

THE PROPOSED LEGISLATION IS UNNECESSARY

The bill disregards current legislation. State and federal legislation has long been in place to deal with abuses by suppliers. Dealers generally have operated their businesses in accordance with these laws and, when aggrieved, many have successfully sued their suppliers. These same laws are available for office machine dealers.

Passage of a special law for office machine dealers would be redundant and confusing. In no way has it been demonstrated that there is a fundamental and overriding problem requiring the extraordinary step of passage of a special federal law for office machine dealers.

The bill disregards suppliers' contributions to dealers. S. 286 is also unnecessary because it starts from the wrong premise that only the dealer brings goodwill to the transaction. In reality, many companies bring their reputation, logo and the fruits of their inventions to the manufacturer-dealer arrangement. They also regularly bring pre-developed products and market opportunities, product acceptance, and customer goodwill established through the strength of the manufacturer's product and the quality of service which has been historically provided.

These products, markets and goodwill, together with such other things as customer lists, are made available to the dealer. Extensive advertising of the product takes place. Education, including service training, is invested in the dealer. In total, the selection of a dealer represents a considerable financial investment by the supplier in the new dealer organization.

Under existing law, relationships with responsible dealers make the sharing of a manufacturers assets, including its name and goodwill, worthwhile. However, the environment that could be created by S. 286 would set up new ground rules and possibly fundamentally alter the relationships between manufacturers and newly authorized dealers for their products. As a result, the dealer channel, while of growing importance for the future distribution of office machines, would become less attractive to suppliers and possibly more costly to use.

The bill overstates the bargaining power of suppliers. Proponents of S. 286 have stated that this legislation is necessary because of the superior economic bargaining position of suppliers over their dealers. CBEMA finds this position hard to accept. The office equipment industry is one of the fastest growing, most competitive and innovative industries in the world, especially in products regularly marketed through dealers.

Illustrative of this competition is the marketplace for desk-top computers which are clearly intended to be covered under this legislation. These products were virtually unknown only a decade ago. Today, as many as 150 different companies offer hundreds of excellent products to the end-user. These companies are all fighting to obtain floor space with independent office machine dealers. A dealer can only carry 4 to 6 different companies' products as shelf space is limited. The dealer is also limited in the number of different products for which it can provide service and maintain parts inventories.

A dealer can discontinue carrying the products of an abusive supplier. The supplier in turn suffers a loss of its investment in the dealer, damage to its reputation, and, finally, a loss of sales opportunities for its products that will quickly go to an

eager competitor. Therefore, in many instances, the dealer, not the supplier, holds the superior economic bargaining power.

We believe the natural forces of the competitive marketplace will correct any abuses, poor products or shoddy responses by manufacturers to their office product dealers.

CBEMA BELIEVES THAT S. 286 IS ONE-SIDED

The bill is an unjustified attempt to favor the interests of dealers over those of manufacturers and consumers. The unilateral "duties" imposed upon suppliers are unfairly one-sided.

The bill fails to protect suppliers. Under the bill, there are no restrictions on dealers rights to terminate or change suppliers. Office machine dealers, on the other hand, are entitled to compensation upon a supplier's termination or non-renewal of their dealer agreement. This right, in practical terms, could become a weapon in a dealer's hands to extract a supplier payoff. Suppliers may often succumb to often unjustified demands by an inefficient dealer seeking reward from a supplier. Unfortunately, these unwarranted payments will ultimately form part of the product price and be passed on to the consumer.

While suppliers do not expect or need such parallel right, the principle of equality within the relationship between office equipment dealer and manufacturer would be anything but balanced if S. 286 were passed.

The bill increases contract complexity. S. 286 will decrease efficiencies. Contracts between suppliers and dealers will be more complex. The term of the dealer agreement will likely be short and for a finite period. All oral statements would form part of the contract. Rather than risk misunderstandings, most matters would be reduced to writing. Therefore, efficiencies that exist today resulting from oral arrangements would be discontinued. Transactions will be slower, and more costly. This will not be in anyone's best interest—including the end-users who may suffer slower turnaround in seeing their orders filled and an increase in the product's cost.

FUNDAMENTAL TERMS IN S. 286 ARE VAGUE AND UNCERTAIN

The provisions of S. 286 will mean a transfer of the obligation to interpret unclear provisions to an already overcrowded Federal court system.

The bill is unclear in definitions. Business persons will be required to enter into arrangements that could be affected by this legislation without knowing the consequences of their actions. By way of example, a dealer can sue a supplier who terminates the agreement before the term has run for damages or injunctive relief when that supplier has not acted in "good faith." However, in another section of the bill, a defense has been created for the supplier who has terminated the dealer agreement for "just good and significant cause." This latter expression has not been defined. It is not clear whether the scope of the defense is narrower, equal to, or broader than the "good faith" provision in the earlier section.

Therefore, the supplier who is considering discontinuing its dealer arrangement and wishes to know whether payment of compensation is required finds the answer unclear in S. 286. For example, must compensation be paid when a dealer is terminated for: (1) repeatedly misrepresenting the manufacturer's product? (2) failure to achieve sales quotas spelled out in the dealer agreement? (3) chronically failing to pay its accounts to the supplier? (4) failure to provide product servicing to the manufacturer's products as called for in the agreement?

Resolution of this conflict is critical in making important decisions involving the dealer-supplier relationship. The answer given by some that the courts will clarify these difficulties over time breeds unneeded uncertainty in all decisions, thereby paralyzing many normal activities by suppliers and dealers.

Besides the lack of clarity with many of the principles, many of the terms used create great uncertainty as to their meaning. For example, many of the supplier's obligations require a standard of "good faith." While this might seem reasonable on the surface, S. 286 deliberately defines this provision differently than the Uniform Commercial Code (UCC). The UCC has seen many years of court interpretations of those words which would be of little help under S. 286. The S. 286 definition is closer to the Automobile Dealers Day in Court Act. However, there is a slight but deliberate difference here too, implying that court interpretations under that law are also not to be followed. The consequence of this is that many years of costly litigation must ensue to determine what "good faith" means under S. 286.

Another term used is "market area." While earlier versions of this proposed legislation in the 97th Congress attempted to define this term, it is left undefined in S. 286. The term "office product" has been broadly defined as ". . . any physical object

or office machine software . . ." Many exceptions are then made including "telecommunications equipment." Many people have been trying for many years to define the scope of "telecommunication equipment" without precise success. "Office machine software" is similarly not defined.

The bill mandates impossible duties on suppliers. Section 101 of S. 286 contains various duties imposed upon suppliers. One provision requires suppliers to ". . . furnish the dealer with any office product, or with any part, reference manual, or schematic related to an office product, on a timely basis." This language poses at least two major problems to suppliers. First, this terminology can be read to require a supplier to supply any of its products, including future products, to dealers notwithstanding that the dealer agreement only identifies ceratin specific products.

While this interpretation seems to extend a common sense reading of the words, some proponents have confirmed that this broad interpretation is exactly what is intended. This could require a supplier to make available products not intended for dealership distribution. Dealers may not have the technical knowledge or maintenace skills to properly handle those products. To avoid confrontation and possible litigation, a supplier may be reduced to terminating and paying compensation to the dealer rather than entrusting certain products to that dealer.

Second, the subsection requires the products, parts, manuals or schematics be delivered to the dealer "on a timely basis" (undefined). No provision is made for delays in delivery that are beyond the suppliers' control. Therefore, in an action for damages, the supplier is open for all claims, including losses, for indirect and consequential damages. Any provision in the agreement which attempts to qualify this concept would presumably be disregarded as an attempt to waive this subsection, which cannot be done under Section 302 of the bill. This is unreasonably onerous and must dampen any businessperson's enthusiams to do business through dealers.

CONCLUSION

CBEMA strongly opposes passage of the Office Machine and Equipment Dealers Act. It is anti-competitive, unnecessary, unfair and unclear. The bill would create a new and unneeded scheme that could adversely impact the exploding American office machine industry. Ultimately, consumers could have fewer choices for products and services while paying higher prices.

S. 286 aims at protecting a few at the expense of many. We believe it should be defeated.

STATEMENT OF DIGITAL EQUIPMENT CORP.

Digital Equipment Corporation appreciates this opportunity to provide for the record its statement in opposition to S. 286, the Office Machine and Equipment Dealer's Agreement Act. Digital opposes this bill because of the adverse impact it believes this legislation would have on the computer industry and, more importantly, on its customers.

Digital is the second largest computer manufacturer in the world with annual revenues in excess of four billion dollars. It manufacturers, sells and services computer hardware, peripherals and software. Digital believes that its success to date is attributable to the quality of its products and its commitment to satisfying the needs of its customers. To maintain these qualities, Digital invests heavily in research and development, highly trained sales and service organization and in training and educational programs for its customers.

Digital sells its products directly to customers and, where appropriate, indirectly through independent companies who resell these products as is or with other products they have developed and manufactured. In choosing these independent companies, Digital looks for organizations that share its commitment to satisfying the needs of the customer, that have the necessary resources and expertise to meet this commitment, and who continue to meet this commitment on an on-going basis.

There are numerous reasons why S. 286 is undesirable and should not become law as evidenced by many statements in the record by other responsible companies, industry groups and Federal officials. More importantly, however, Digital believes this bill is undesirable because it focuses on the distribution channel and ignores the interests of the customer.

This legislation would seriously undermined the ability of responsible manufacturers to ensure that their products are properly and fairly sold and serviced by perpetuating inefficient dealer-manufacturer relationships. This perpetuation can only have an adverse effect on the customer in the form of higher prices and decreased satisfaction. Conversely, S. 286 will discourage manufacturers and suppliers from

entering into new dealer relationships. This will lessen the choices available to the customer and decrease interbrand and intrabrand competition.

This legislation would also require manufacturers and suppliers to supply dealers with any and all of their products. Digital, for example, offers a wide variety of computer systems and related equipment varying in price from a few hundred dollars to more than one million. These products increasingly vary in capability and complexity. Increasing levels of expertise, resources and training are required to properly sell and service larger and more complex equipment. If Digital and other manufacturers and suppliers are forced to sell all of their products to dealers, irrespective of the dealers' expertise, training and resources, once again the customer will be adversely affected.

Digital is part of a highly competitive, responsible industry that contributes significantly to the economy of our country. Digital believes this bill is unnecessary, that it will have a harmful effect on industry and, most importantly, that it will adversely affect the customer. As a responsible manufacturer, Digital opposes this narrow, special-interest legislation. S. 286 should not become law.

DEALER'S OFFICE EQUIPMENT,
Waukesha, Wis., March 16, 1983.

Hon. ROBERT KASTEN,
Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: This letter is written regarding Senate bill S. 286. The "Office Machine and Equipment Dealers Act."

Dealer's Office Equipment Inc., a wholesaler, is also Wisconsin's largest independent calculator and portable typewriter dealer. I am past president of the Wisconsin chapter of the National Office Machine Dealer Association (NOMDA), and met you last year as the legislative chairman of the Brookfield Chamber of Commerce.

The Act as it is currently worded is *not* acceptable to us. As a wholesaler we fit under the same "supplier" heading as the manufacturer. This is unfair because we have many of the same problems with manufacturers that the dealers have. Under current wording a middleman can be held responsible, by the dealers, for problems we are having with the manufacturers. This is not fair to the wholesaler.

The bill also fails to address many major problems with offshore manufacturers. The offshore manufacturers are not held to the same standards as American manufacturers. This places offshore manufacturers at a competitive advantage with American manufacturers. For instance, models of a product change often. Parts necessary to repair 3 or 4 year old models are often simply not available. If parts are "available" the cost of a part may exceed the dealer cost of the current equivalent model machine. Parts availablility is important because 3 or 4 year old machines are most likely to break down. All machines come with warranty cards stating the "manufacturers warranty". The dealer as seller of the product usually gets stuck providing "free" warranty work for the offsore manufacturer. He also gets stuck explaining to his customer why parts are not available or are so expensive 3 years down the road.

The greatest problem facing manufacturing business today is financing!!! Although the typewriter was invented in Milwaukee years ago it would be almost impossible to manufacture typewriters on a start up basis in Milwaukee today. A minimum $20,000,000.00 would be needed to buy the sophisticated machines necessary to manufacture and be competitive in the world market.

The venture capital is available in Japan. Japanese people have no need for typewriters. They read up and down a paper vertically rather than across the paper horizontally as we do. There are now 5 Japanese companies manufacturing typewriters strictly for foreign consumption. Where did they get the venture capital? How do you enforce dumping laws if the Japanese have no domestic need for a product? Why aren't American corporations manufacturing products strictly for foreign consumption?

New legislation is necessary to answer some of the problems listed above. For Dealers Office Equipment the currently worded legislation would create more problems that it would solve.

Please keep me advised on the progress of this bill.

Sincerely.

JON DEGLOPPER, *President.*

MICRO SWITCH,
July 22, 1983.

Hon. BOB KASTEN,
Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: After reviewing the contents of the proposed legislation in H.R. 1159, "Office Machine and Equipment Act," which will be taken under consideration by your Subcommittee in September, I would like to express my strong opposition and question the need to single out this industry for such legislation.

Benefits of the bill are very preferential to the dealer and create innumerable problems in supplier/dealer relationships. It further discourages usage of the dealer channel for distribution of products with the burdens of federal regulations it imposes and, in the long-term limits freedom of choice on the part of manufacturers. The ultimate result could and would add to the cost of doing business which, in the end, is passed on the consumer—and creates anything but a competitive climate.

With existing state and federal antitrust laws, other statutory and common law contractual and consumer rights providing protection from unfair business practices, there is sufficient recourse already in place for dealers. There is no reason to provide special federal relief to the insufficient and ineffective dealers who stand to profit the most from this legislation.

This is a healthy and growing, highly competitive, sector of the economy, so let's not impose legislation that will stymie or curtail the positive contribution to the U.S. trade balance these products and services provide, not to mention the hundreds of thousands of people they employ.

I urge strong opposition to this bill, H.R. 1159.

Sincerely,

JAMES C. SKYRMS,
Vice President and General Manager.

BRANDT, INC.,
Watertown, Wis., August 16, 1983.

Re: S. 286/H.R. 1159, Office Machine and Equipment Dealers' Act.

Hon. ROBERT W. KASTEN, Jr.,
U.S. Senate, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR KASTEN: Through a recent magazine article I became aware that former Senate Bill 1276 has been re-introduced to the Senate this year and has also been introduced to the House of Representatives. Having only excerpts available. I would appreciate a copy of the complete bill, as it currently reads, from your office.

As before, I am extremely uncomfortable with this proposed legislation. I fully concur with its intent and objective, however, the language is written so broadly that many unpredictable and unwanted results will surely occur.

One principle area of concern is with the definition section, especially what constitutes a "dealer". Our company markets its products directly to end-user customers by means of an independent sales force of manufacturer's representatives. These representatives never take title to the products for the purpose of resale, but instead solicit orders on our behalf for which they are paid a commission. Though certainly not "dealers" in the traditional lay sense, it is quite likely that, given current bill language, representative arrangements such as ours will be included in the broad net of this bill.

If I am wrong in assuming that traditional manufacturer's representatives are not intended to be included in the bill's coverage, please so inform me. If I am correct, I strongly urge your help in amending the definition section so that "dealers" are defined in the sense that you and I traditionally view them, i.e., persons who buy products for the purpose of resale. These are the individuals who make the large investments in inventory; who incur the normal entrepreneurial risks; and who should be the subject of this bill's protection.

Many companies utilize a direct sales force, whether they be salaried employees, commissioned sales agents or manufacturer's representatives. It would be indeed unfortunate if these companies were to become adversely affected because of an oversight in legislative draftsmanship.

Your attention to this matter will be greatly appreciated, and I will look forward to receiving any information that you may have.

Very truly yours,

JAMES F. ROSENOW, *Corporate Attorney.*

U.S. SENATE,
Washington, D.C., September 2, 1983.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: We are writing to you today to express our opposition to the Office Machine and Equipment Dealers' Agreement Act (S. 286). We are certain, after careful review, that you will agree that this proposed legislation would have unfortunate implications for Vermont if it were to be passed.

It is clear that the legislation, if passed, would place an unreasonable burden upon the high technology firms located throughout Vermont. The bill would harm all office equipment manufacturers and suppliers to the detriment of competition and affordable prices.

Beyond these concerns, it is evident to us that the legislation is duplicative and unnecessary. It purports to provide relief to office equipment dealers when sufficient legal remedies currently exist. Moreover, the bill would create a special loophole in Federal law for dealers to protect themselves only from the normal risks of doing business. Small businesses must be protected from unfair trade practices, however, this bill is not the route to take.

The economy of the State of Vermont is heavily dependent on high technology firms that provide jobs and security for our people.

Thus, we would urge that this legislation, the Office Machine and Equipment Dealers' Agreement Act, be rejected by the Commerce Committee during the coming months. In the event hearings are held, we trust the technology industry will be accorded an opportunity to present its concerns.

Sincerely,

PATRICK LEAHY,
U.S. Senator.

ROBERT T. STAFFORD,
U.S. Senator.

JIM JEFFORDS,
Member of Congress.

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS,
Washington, D.C., September 12, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Subcommittee on Consumer,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I understand that the Subcommittee on Consumer will conduct hearings on S. 286, the Office Machine and Equipment Dealers' Act on Wednesday, September 14, 1983. On behalf of the National Association of Wholesaler-Distributors (NAW), I am writing to express our industry's strong opposition to this legislation.

NAW testified in opposition to identical legislation, H.R. 1159, before the House Energy and Commerce Subcommittee on Commerce, Transportation and Tourism on July 21, 1983. Since then, we have seen no evidence whatsoever to cause us to change our views, and I would therefore respectfully request that this letter and the attached statement be included in the September 14 hearing record.

NAW wishes to reiterate that its concerns range from the conceptual underpinnings of the Office Machine and Equipment Dealer's Act to specific deficiencies contained in the bill itself. Let me emphasize that S. 286 unreasonably and unnecessarily constrains a highly competitive marketplace. It would lead to inefficiencies in the distribution of goods to end users, raising both costs and consumer prices.

In sum, Mr. Chairman, S. 286 is an example of special interest legislation at its worst. It is bad law for our industry and all others, and we continue to oppose this measure in any form.

Thank you for the opportunity to present our views.

Sincerely,

Enclosure.

JAMES A. ANDERSON, Jr.,
Director, Congressional Relations.

STATEMENTS OF RAYMOND K. BENZA, PRESIDENT, R. E. KINDEL CO., INC., CINCINNATI, OHIO, AND JOHN H. FITCH, JR., VICE PRESIDENT, GOVERNMENT RELATIONS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

SUMMARY

The National Association of Wholesaler-Distributors (NAW), its 120 affiliated national wholesaler distribution trade associations and the Association's aggregate 45,000 members strongly oppose H.R. 1159.

Aside from the conceptual flaws of this bill, it would cause specific, serious problems for wholesaler-distributors.

Compliance and recordkeeping would more than likely be impossible burdens for wholesaler-distributors. How would dealer sales be traced to determine if products were bought for an "office environment"?

H.R. 1159 includes wholesaler-distributors in its definition of "supplier". Such a definition, which has the effect of extending liabilities for violations of the bill to wholesaler-distributors, fails to comprehend the functional differences between wholesaler-distributors and manufacturers. Wholesaler-distributors are entirely dependent upon manufacturers for the prompt filling of orders so that dealer orders can be met on a timely basis.

This definition is gravely deficient and would result in inequitable treatment for wholesaler-distributors.

The definition of "dealer agreement" is also of serious concern to our industry.

Given the open-ended nature of this definition, wholesaler-distributors could be establishing dozens of dealer agreements per day. The bill fails to recognize marketing realities in requiring wholesaler-distributors to notify existing dealers of a new account in a market area. In many commodity lines there is a highly competitive market which could not comport with the scheme established in this bill.

NAW opposes this legislation as unworkable and unnecessary. Ample protections already exist in state and federal law to address these sorts of concerns.

STATEMENT OF RAYMOND K. BENZA

My name is Raymond K. Benza. I am appearing before this Subcommittee today on behalf of the National Association of Wholesaler-Distributors (NAW), and as the immediate Past President of the National Association of Writing Instrument Distributors (NAWID) and as President of R. E. Kindel Company, Inc. of Cincinnati, Ohio.

At the outset, I want to thank the members of the Subcommittee for the opportunity to present my views and those of the wholesale distribution industry on the "Office Machine and Equipment Dealers Act" H.R. 1159.

R. E. Kindel Company, Inc. was founded in 1901 by my grandfather, Robert E. Kindel. Since 1901, ownership of the business has been retained entirely within our family. We are a small business engaged in the wholesale distribution of writing instruments and other office products, employing approximately 25 people with gross annual sales of $3.5 million.

The National Association of Writing Instrument Distributors is a national trade association composed of approximately 40 wholesaler-distributors and 40 manufacturers of writing instruments. The vast number of wholesaler-distributors are companies which are very similar to R. E. Kindel Company. That is, they are small, family-owned businesses.

On behalf of my Company, the members of NAWID and NAW, I am here today to voice our strongest opposition to H.R. 1159.

First, I would like to explain the competitive market situation for writing instruments in the area serviced by R. E. Kindel Company, Inc. Our trading area, as we at R. E. Kindel define it, encompasses portions or all of the states of Ohio, Indiana, Kentucky, Michigan and West Virginia falling within an approximate radius of 250 miles of Cincinnati. Within this area there are presently fifteen wholesaler-distributors, all of whom compete with one another. Of the fifteen distributors, five are branches of national wholesaler companies. In addition, there are four major buying cooperatives now functioning within the same area.

The distribution channel for writing instruments within this area generally is from the manufacturer to wholesaler-distributor to the dealer. However, there is an important exception to this distribution method. That is, the dealer must be broken down into two categories—large or small. In the case of the large dealer there are several instances where the manufacturer sells to that dealer on a direct basis. Therefore, R. E. Kindel Company competes not only with other wholesaler-distributors for the large dealers' business but also with the manufacturer from whom we purchase our products.

The dealer, therefore, has a wide selection of wholesaler-distributors and other sources from whom it can purchase writing instruments. As a practical matter, the dealer will shop the particular product he wants to buy. In addition, the practical problem which the writing instrument wholesaler confronts is that the dealer terminates us rather than we terminating the dealer. Clearly then this is a most competitive marketplace and one which provides the dealer with the best possible situation for purchasing writing instruments, which is turn benefits the consumer. Further, this competitive market situation is not unique to the area which R. E. Kindel services but also exists throughout the country.

With this background I would now like to address specific provisions of H.R. 1159 which are of concern to the wholesale distribution industry.

WHAT IS A DEALER?

Under Section 2(2) a dealer is defined as any business enterprise ". . . operating under the terms of a dealer agreement and primarily engaged in the business of selling any office product of a supplier to an end user of such office product . . ." Previous drafts of this legislation limited the scope of this definition to dealers who were "primarily engaged in the business of selling the product of a supplier to an end-user for use in an office environment." The affect of this modification is to expand the type of dealer which will be afforded the protection of H.R. 1159 to include many other types of buyers such as department stores.

A WHOLESALER-DISTRIBUTOR IS NOT A SUPPLIER OR MANUFACTURER

Section 2(11) defines the "supplier" as a ". . . manufacturer, distributor or wholesaler engaged in commerce who enters into a dealer agreement with a dealer in order to supply the dealer with an office product." This definition is entirely too broad and fails to recognize the traditional functional differences between a manufacturer and the wholesaler-distributor. As a wholesaler-distributor of writing instruments, R. E. Kindel Company, Inc. is entirely dependent upon the manufacturer for the supply of the products which we sell to dealers. Our ability to supply a product to the dealer on a timely basis is wholly contingent on the manufacturer's production, shipping, and marketing decisions. Yet, our company would be equally subject to the provisions of H.R. 1159 as would manufacturers.

In addition, in many instances, the wholesaler-distributor would face greater exposure to liability than the manufacturer since the proposed legislation affords no protection what soever for the wholesaler with respect to this relationship with the manufacturer. For example, where the manufacturer sells its product through the wholesaler who ultimately sells to a dealer under a dealer agreement, the manufacturer is totally insulated from liability for alleged violations of Sections 101 and 201 of the Act since no "dealer agreement" exists between it (manufacturer) and a dealer. Yet, if the manufacturer is unable to deliver the product to the wholesaler-distributor who, in turn, is unable to fulfill the terms of the dealer agreement, it is the wholesaler who must then shoulder the entire burden and expense of showing that it did not fail to act in "good faith" under Section 101(3).

We submit that such a situation is entirely unfair and completely ignores the role of the wholesaler-distributor in the marketplace. The financial resources of a wholesaler-distributor will be significantly reduced if monies are required to be spent in defending itself in litigation because of the sanctions imposed by H.R. 1159 instead of building and expanding our businesses.

WHAT IS A DEALER AGREEMENT?

One of the provisions of H.R. 1159 which concerns us most is the definition of a dealer agreement under Section 2(3). A dealer agreement is defined as ". . . any written or oral agreement or contract between any supplier engaged in commerce and any dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract, for a definite or indefinite period."

In the day-to-day operation of my company and, indeed, many other wholesale distribution firms, salespeople solicit orders from dealers, orders are taken by telephone, and orders are received by mail. In each such situation, it is our intent and hope that we can accept those orders and agree to sell the product to the dealer and receive payment. We do not include provisions in our sales orders defining the dealer's geographic selling area nor would we contemplate such a clause. Yet it is certainly not inconceivable that a Court would rule that the acceptance of these orders creates a dealer agreement within the meaning of Section 2(3).

DEFINITION OF "PRODUCT"

Section 2(10) defines a product as ". . . any physical object or office machine software which is designed primarily for use in an office environment, and which has a suggested retail price greater than $100.00 per item." This definition clearly ignores the realities of the writing instrument industry. A number of the products which are currently sold through the writing instrument wholesale-distributor, such as pen and pencil sets, desk sets and the like exceed the minimum price. In addition, the concept of defining "Product" on the basis of the suggested retail price requires that the wholesaler-distributor monitor the suggested retail price if there is one, or the price at which the dealer sells the product. Simply stated, this is not an appropriate function for the wholesaler-distributor to perform. The typical wholesaler-distributor does not have the personnel or the financial resources to perform such a task. The added costs of implementing such procedures as would be necessary to accomplish this task would be prohibited and do nothing more than result in higher prices to the buyer.

CONCLUSION

In summary, we strongly urge this Subcommittee to dispense with any further consideration or actions regarding the proposed "Office Machine and Equipment Dealers Act", H.R. 1159. Again, I would like to thank the Subcommittee for the opportunity to appear and present the views of R. E. Kindel Company, Inc., the members of NAWID and NAW.

Thank you.

STATEMENT OF JOHN H. FITCH, JR.

Mr. Chairman, Members of the Subcommittee, my name is John H. Fitch, Jr. and I am Vice President, Government Relations of the National Association of Wholesaler-Distributors (NAW). NAW appreciates the opportunity to offer its views at today's hearing on H.R. 1159 as amended.

NAW is the umbrella organization representing the overall interests of the wholesale distribution industry. Our association has 120 affiliated national wholesale distribution trade groups (see Appendix A) and an aggregate membership of approximately 45,000 firms.

With sales expected to top $1.4 trillion in 1983, wholesale distribution is a critical link in the marketing chain, employing 5.4 million Americans at over 30,000 locations throughout the country. While the vast majority of firms in this industry tend to be small to medium-sized closely-held, family-owned businesses, their collective economic importance is considerable.

NAW's affiliated organizations account for approximately 60 percent of that annual sales volume, with some 150,000 places of business around the nation.

Our witness today is Mr. Raymond K. Benza, President of the R. E. Kindel Company, a Cincinnati-based, family-owned writing instrument and office supply distribution firm.

In addition to speaking on behalf of NAW, Mr. Benza is also appearing here in his capacity as Past President of the National Association of Writing Instrument Distributors (NAWID), an NAW affiliate.

Mr. Chairman, let me just preface Mr. Benza's comments with a few brief remarks.

As amended, H.R. 1159 is an improvement over its predecessor. Nonetheless, NAW believes the concepts behind this bill to be fundamentally flawed and will continue to strongly oppose it in any form.

You have already heard about many of the problems which would result from enactment of this bill. What we hope to give you today is a perception of the particular difficulties H.R. 1159 would create for wholesaler-distributors. While Mr. Benza's remarks come from firsthand experience in the writing instrument distribution

business, what he says has wide application to other commodity lines within our industry.

In essence, this bill fails to comprehend the marketing, functional and operating characteristics of wholesale distribution firms. Under the scheme set forth in this bill, wholesaler-distributors could not operate. Mr. Benza will illustrate some very practical problems in this regard.

In closing, Mr. Chairman, our industry believes ample protections exist in state and federal law to address concerns raised by office machine dealers, and indeed, those of any other industry group that might have these kinds of problems. We oppose this bill in principle as bad law for this or any other industry.

Thank you very much, Mr. Chairman.

AMERICAN ELECTRONICS ASSOCIATION,
GOVERNMENT OPERATION OFFICE,
Washington, D.C., October 19, 1983.

Hon. BOB PACKWOOD,
Chairman, Senate Committee on Commerce, Science, and Transportation, Russell Senate Office Building, Washington, D.C.

DEAR CHAIRMAN PACKWOOD: I am writing you to express the strong opposition of the Amercian Electronics Association to the Office Machine and Equipment Retail Dealer's Agreement Act, S. 286/H.R. 1159.

The American Electronics Association (AEA) represents over 2,300 member companies nationwide, and over four hundred financial, legal and accounting organizations which participate as Associate Members. AEA encompasses all segments of the electronics industries including manufacturers and suppliers of computers and peripherals, telecommunications equipment, defense systems and products, instruments, semiconductors and other components, software, research and office systems. AEA companies account for 63 percent of the worldwide sales of the U.S. based electronics industries.

Our companies view this bill as purely special interest legislation. We believe it ignores the public interest on behalf of a narrow group of interested parties. We also oppose it for the following reasons:

The legislation is unnecessary. The Uniform Commercial Code (UCC) and many state laws already provide dealers with an adequate process for remedying complaints against suppliers. The UCC already requires good faith relationships and fraud is clearly illegal. Dealers today have no difficulty being heard in court under current laws.

This legislation will generate overwhelming practical problems in supplier/dealer relationships. By forcing a supplier to provide a dealer with any product made or sold by the supplier on demand, the bill obligates a supplier to provide future products developed after establishment of the dealer agreement. Furthermore, this requirement is imposed whether or not the product is contemplated by the dealer's agreement and whether or not the supplier desires to market the product to that dealer.

The bill will create what may become a potentially anticompetitive environment. It will restrict choices and raise prices to consumers, disrupt the distribution practices of manufacturers, wholesalers and distributors to become office equipment dealers. The Federal Trade Commission is strongly opposed to this legislation for these reasons.

The thrust of this legislation is certain to promote a flood of litigation. At a time when Federal courts are overloaded, the bill creates a new burden in an area well covered by state law. Dealers would have great incentive to file suites, because they can obtain damages, injunctive or other equitable relief and attorney's fees if successful.

The proposed Office Machine and Equipment Retail Dealers' Agreement Act is opposed by a broad-based group of large and small retailers, wholesalers, distributors, and manufacturers, and consumer and public interest groups for the reasons stated above.

We hope that you will oppose attempts to enact this legislation. We would be pleased to meet with you and your staff to discuss the matter further and provide additional information if that would be helpful.

We appreciate your consideration of this matter.

Sincerely yours,

KENNETH C. O. HAGERTY,
Vice President, Government Operations.

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